REPORT TO
THE PUBLIC GUARDIAN AND TRUSTEE

ON

SECTION 9
REPRESENTATION AGREEMENTS
WITH GENERAL POWERS

Prepared by Dulcie McCallum

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Government's Response to the McCallum Report

Dulcie McCallum was asked by the Public Guardian and Trustee to undertake a consultation process with the community regarding who, if anyone, should be designated as a class of persons prescribed by regulation to be a consultant for the purpose of section 9 of the *Representation Agreement Act*.

Ms. McCallum's report describes the consultation process that took place between February and July 2000 and makes several recommendations.

The Public Guardian and Trustee submitted the report to Government. On September 25, 2000 the Attorney General announced that the following recommendations were accepted.

#	**Key Recommendations Accepted by Government**
1.	That notaries public be designated as a prescribed class of persons under s.9 of the *Representation Agreement Act* and that the *Notaries Act* be amended to include reference to representation agreements as a responsibility of notaries;
2.	That no other class of persons be designated at this time;
5.	That the *Representation Agreement Act* be amended to provide for a form of section 9 representation agreement to be prescribed by regulation and that use of that form be optional.
6.	That notaries public be required to take a training course for competency examination pre-approved by the Public Guardian and Trustee as a pre-requisite to acting as a consultant to persons wishing to prepare a section 9 representation agreement; and

Implementation Timing

As adopting these recommendations involves changes to two statutes, and the development and approval of a curriculum and examination for the training program, it will take some time before these changes can be implemented. The Government has indicated it will make every effort to ensure the delay is as short as circumstances permit and that consultation with representatives in the health, legal and advocacy communities will continue.

The Government will be taking the other recommendations in the McCallum Report under advisement, but will not act directly to implement them at this time. The implementation of representation agreements and the changes announced by government will be monitored.

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REPORT TO THE PUBLIC GUARDIAN AND TRUSTEE

ON

SECTION 9 REPRESENTATION AGREEMENTS WITH GENERAL POWERS

Prepared by Dulcie McCallum

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Mr. Jay Chalke
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July 24, 2000

Dear Mr. Chalke

Re: Section 9 Representation Agreements with General Powers

I am pleased to provide you with my report with respect to s. 9 Representation Agreements with General Powers. Earlier this year you requested that I undertake a consultation process with the community regarding who, if anyone, should be designated as a class of persons prescribed by Regulation to be a consultant for the purpose of s. 9.

That consultation process began in early February of this year and was completed early in July. The list of contacts provided by your office proved to be a helpful beginning to the process though many others chose to participate. Everyone with whom I met and the countless people and organizations that contacted me by telephone, fax and email all made a tremendous contribution to the outcome of this Report. I appreciate the efforts made by everyone in this regard. Your office staff was particularly helpful in ensuring that all of those individuals who wanted to contact me could do so easily and in confidence.

This Report has been prepared based on the information provided by those consulted and my independent analysis of the information gathered. The findings and recommendations are based on the evidence presented and are wholly mine. I understand that you will now consider my report and thereafter, you will provide it to the Attorney General, the Honourable Andrew Petter. The Attorney will be responsible for making the report public and for making the final decisions as to implementation of those recommendations directed towards the provincial government.

I appreciated being asked to undertake this very interesting consultation and report preparation. I hope the resultant report is of some assistance to you and the Attorney General in addressing the very important issues raised.

Yours truly,

Dulcie McCallum

REPORT TO PUBLIC GUARDIAN AND TRUSTEE

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Executive Summary

Whenever the Legislature takes the law to new and innovative places, there is inevitably a period of confusion, adjustment and learning. The new guardianship legislative package composed of four new statutes is a case in point. For many people it is viewed as a bold step towards including many people who previously were disenfranchised under the law. Others meanwhile scrutinize the laws carefully and react with tacit criticism and genuine concern. Most people however, seem to appreciate the value of the laws to enable British Columbians to plan for their future.

Over the course of more than a decade the Public Guardian and Trustee of British Columbia [PGTBC] and its predecessor, the Office of the Public Trustee, has been diligent in staying the course to bring the law into force while at the same time responding to the interests of all of those who have identified problems about the legislation. Throughout this Report the Office will be referred to as PGTBC and when referring to the incumbent Public Guardian and Trustee it will read PGT.

The PGT decided to initiate a review process with the affected stakeholders to solicit information and opinions regarding who, if anyone, should be prescribed by Order-in-Council, as a class of persons to consult under s. 9 of the *Representation Agreement Act ["the RA Act"].* A comprehensive consultation took place from the beginning of February to the of beginning of July. The reporter extends her sincere appreciation to all those who willingly participated and who made a significant contribution to the process. Many other issues related to the guardianship legislation package were raised during the consultation. This Report, however, will remain primarily focussed on the specific questions asked of the consultant by the PGT. It is intended that the Report will be made public after the PGT has made recommendations to the Attorney General.

The legislative package that includes the *RA Act* has been developed through a joint community and government collaborative process over the last decade. Many of those who worked tirelessly to see the guardianship legislation come to fruition also participated in this consultation process. Their long-standing commitment to the process and the new laws is noteworthy. The legislation is based on a number of important guiding principles that were carved out over this long period of community development and continue to form the foundation of the new laws. This Report is cognizant of and will attempt to respect the underlying principled approach taken both in the developmental phase of this legislation and in the resultant statutes, regulations and guidelines.

In order to assess whether any other class of persons should be prescribed as "consultants", the initial question is 'What, in essence, and how, are the decisions to be made under s. 9?'*

In other words, what are the essential competencies for a person designated as a consultant for the purpose of s. 9? Examining the question posed by the PGT in that way leads to the conclusion that the prescribed classes, like members of the Law Society already named in s. 9 of the governing statute, must know how to:

- evaluate a person's incapability
- understand the implications of:
  - naming a person or persons to be a representative(s) and
  - any instructions, directions or conditions made under s. 9 agreements regarding:
    - personal care
    - financial matters
    - health care and
    - legal affairs,

and to do so in a professional, objective and independent manner.

Sections 7 and 9 Representation Agreements have become known as standard and enhanced Representation Agreements, respectively. More recently, the PGTBC has clarified the appropriate language to be used under the statute. For the purpose of this Report, a s. 9 agreement will be referred to as a Representation Agreement with General Powers while a s. 7 agreement will be a Representation Agreement with Limited Powers.

The decisions to be made in a Representation Agreement with General Powers will allow a person to plan and make major choices in advance notwithstanding their later incapability. The role of the consultant is very important, therefore, given the extraordinary powers potentially given to the representative by the donor during her or his lifetime. What the donor is doing in an agreement is making major life decisions of all kinds. These are some of the most important decisions to make regarding property, life and death, restraints and care of dependents.

"[advance directives] presuppose that the person giving the directives is competent, informed, and willing to make choices about treatment. The rationale for encouraging advance treatment directives should be the value that we place on patient autonomy and includes the concept of empowerment, self determination, and patient accountability. The rationale should not be directed to the concepts of cost savings, allocation of resources, or discrimination because of age, disease, or other social or "quality" perspectives."[original emphasis]

College of Physicians & Surgeons

Policy Manual

End of Life Treatment Decisions

* Schedule 1 to this Report provides the full text for sections 7, 8, 9, and 10 of the *Representation Agreement Act*.

"I am writing on behalf of the .... Community Response Network, in response to the decision, to allow only lawyers to write up Representation Agreements, under the new Adult Guardianship Legislation. The Network believes that this regulation, and the high legal fees attached...will impede those most needing the agreement from having one. Those that are affected by the legislation, are often, low income earners, and cannot afford the fees that lawyers will charge for such a service."

Letter dated March 28, 2000 received from the Chairperson of a Community Response Network

The legislation strives to give every person the opportunity to be self-determining and to declare his or her wishes, preferences and desires. The requirement to have a lawyer certify the agreement, while it seems a natural safeguard, may act as a barrier for many British Columbians. This Report recognizes that the central issues of this consultation are quality, access, safety and protection. The recommendations in this Report seek to find a balance between protecting the public and ensuring people have choices. The goal is to enable everyone who wishes to have a Representation Agreement to have access to qualified, affordable, and available consultants.

The Report makes the following major findings:

- the governing statute contemplates the naming of other prescribed classes of persons in addition to lawyers
- the newly prescribed classes of persons should be required to take training pre-approved by the PGT or be tested in advance for demonstrable competency in Representation Agreements with General Powers
- the public interest requires that all prescribed classes of persons are competent, professional and required to be insured by law
- the purpose of the *RA Act* is to enable British Columbians to plan for future decision making in advance of their incapability
- Representation Agreements with General Powers should be accessible, affordable and available
- the role of consultant is very important in determining incapability and assisting the donor with life's major decisions
- the word "consult" requires definition
- the role of community resources in assisting donors to make informed decisions in their representative agreements should be recognized
- a prototype or standardized form for s. 9 Representation Agreements with General Powers should be designed and made available by the PGTBC.

This Report proposes multiple recommendations with respect to the questions posed by the PGT. In summary, the Report recommends:

- the development of a standardized s. 9 form for Representation Agreements with General Powers to be made publicly available
- a definition for "consult"
- legal aid for people with limited resources
- new classes of prescribed persons including notaries public
- training pre-approved by the PGT for prescribed professional consultants
- wrap around training to be developed in conjunction with the required course to benefit members of the public
- consultation with other jurisdictions with respect to the impact of representation agreements made out of province regarding decisions to be made within BC
- recognition of the role of community resources
- a proposal for the Law Society of BC to consider with respect to the work of lawyers as consultants.

These recommendations are intended to meet the challenge of improving access without compromising quality. In that regard, it is important for the Attorney General to make note of the following.

The legal community and others have identified many problems with the legislation and have proposed amendments to rectify those problems. The extent of the problem is such that many lawyers are not willing to recommend or prepare a representation agreement of any kind until these changes have been made. This legislative package was intended to open up the area of future planning for the majority of British Columbians. Ironically the execution requirements have made the process cumbersome, complex and confusing. This is a grave disappointment to many. For that reason, I would urge the Attorney General to consider the proposed amendments put forward by the legal community and others and give them top priority in the next legislative sitting. One of the underpinnings to an accessible law is that it is clear, workable and understandable. The proposed amendments will greatly enhance the chance of that goal being achieved. Indeed, many of the findings and recommendations contained in this Report are premised on the Attorney General proceeding with those amendments forthwith.

Questions to be Answered in the Report

The Consultant was asked:

a. To prepare a report with recommendations to the PGT regarding section 9(2)(a) of the *RA Act* on whether to expand the persons prescribed on the basis of:

   i. Professional/occupational group (e.g. notaries, health care providers)

   ii. training (e.g. a course approved by the PGT)

   iii. type of authority under s. 9 (e.g. health care only)

   iv. or other factor(s).

b. To balance the right of adults to self-determination with the need for safeguards in the legislation.

c. To consider the issues of accessibility and affordability for adults wishing to make agreements.

d. To consult with affected stakeholders.

The Consultation Process:

1. Who were the affected stakeholders?

   The general categories of stakeholders were:*

   a. Professional bodies in the fields of health care and law

   b. Financial institutions including banks and credit unions

   c. Community advocacy associations

   d. Service Providers

   e. Educational or training institutes

   f. Individual respondents with expertise in guardianship, seniors and disability issues.

2. What were the other sources of information provided to the consultant?

   Many individuals and agencies took the time to write, fax, email or call regarding this consultation. This included many seniors who took the time to write and prepare briefs on who should be named a consultant under s. 9. There was an overwhelming number of letters from seniors in response to the notaries' public information campaign. The content of these submissions together with the written brief from the provincial Seniors' Advisory Council, provided invaluable insight into the issues from a senior's point of view.

   Other individuals who work in related fields such as an ethics consultant, university professors, advocates for people with a disability, and senior citizen and peer counsellors to list a few, initiated contact with the consultant and brought unique perspectives to the review.

3. What were some of the main questions addressed during the consultation process?

   - What is meant by a "prescribed class of persons"? Can those listed in the regulations be individuals, societies, associations, or must they form a class as a professional or occupational group to be prescribed in the regulations?
   - What is meant by the word "consults" in s. 9? What is the nature of the consultation contemplated by the s. 9 requirement?
   - What is necessary in order to make a process affordable and accessible for the intended beneficiaries of the legislation?
   - What are the safeguards contained in the legislation that are relevant to the analysis of who should be able to consult under s. 9?

* Schedule 2 of this Report lists the agencies, bodies and associations consulted and their designated representatives. This list is a compilation of names provided by the PGTBC and others who came forward during the process and expressed an interest in being part of the review.

- What educational background, professional training or expertise is necessary to understand, appreciate and advise on the significance and implications of a s. 9 Representation Agreement?
- What impact does it have that the main difference between s. 7 and s. 9 appears to be more a question of degree rather than kind of decision to be made?
- Are there any other professional or occupational bodies with the same or similar expertise, educational background or professional protections including liability insurance, continuing education, and professional discipline procedures that would be appropriate consultants under s. 9?
- Are there additional policy concerns that need to be considered in determining who should be named as a prescribed class of persons?
- Does the inclusion of lawyers in the statute make it clearer or less clear that to "consult" under s. 9 is the practice of law as different from a legal service, or was it intended to be broader?
- What, if anything, distinguishes an enduring power of attorney from a Representation Agreement that removes it from the usual legal services within the professional scope of practice of notaries or are the two similar in kind?
- What, if any, are the particular concerns with respect to the inclusion of notaries as a prescribed class?
- If notaries are to be included as part of the recommendations from this Report, what, if any, legislative changes are required?
- If others are prescribed as a class of persons, what training, if any, should be required before being considered competent to act as a s. 9 consultant?
- For those already trained or well versed in the new legislation, is there an appropriate way to measure their competence to be a person prescribed under s. 9 in advance?

Guiding Principles

The *RA Act* clearly states its purpose in s. 2:

> *2 The purpose of this Act is to provide a mechanism*
>
> *(a) to allow adults to arrange in advance how, when and by whom, decisions about their health care, personal care or financial affairs or about other matters will be made if they become incapable of making decisions independently, and*
>
> *(b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.*

These goals and purposes reflect the principles articulated in "How Can We Help", the report developed through the community process issued in 1992:

i. All adults have the right to autonomy and self-determination and the right to enjoy the fundamental rights and freedoms prescribed in the Canadian Charter of Rights and Freedoms.

ii. All adults are entitled to receive the most effective but the least restrictive, least intrusive, and least stigmatizing form of assistance, support or protection when they are unable to act independently, inter-independently care for themselves or for their property and financial affairs, particularly where there is a risk that the adult will be subjected to abuse and neglect.

iii. All adults are entitled to the legal presumption that they are capable of making decisions and, where necessary, to support and assistance in order to understand and make informed decisions on their own behalf.

iv. The use of court procedures and court orders appointing decision makers or Guardian for adults should occur only as an absolute last resort and only after alternatives such as the provision of supports and assistance have been either attempted or carefully considered.

v. All procedures, protocols and other processes associated with the provision of support, assistance or protection shall be intellectually, psychologically, physically, culturally, and financially accessible to all adults.

Section 9 of the *RA Act* – What's it all About?

Section 9 enables an adult to plan ahead by documenting his or her wishes in advance, and through their chosen representative have decisions made, at some time in the future, on that basis.

The decisions contemplated by s. 9 Representation Agreements with General Powers are some of the most significant choices to be made by an adult during her or his lifetime. The decisions that can be made in a representation agreement are provided for in s. 9(1) of the *RA Act*. The donor making the agreement must:

- name a representative(s) and/or alternates
- choose from those powers provided for in ss. 7 and 9 and specify the powers in the agreement itself
- be able to demonstrate to the consultant that he or she understands what it means to name a representative and appears to understand the nature and effect of the provisions contained in the Representation Agreement with General Powers.

The instructions, directions or conditions that can be provided in an agreement are specifically listed in the statute under ss. 7 and 9, respectively, and are paraphrased below. The following table will assist the reader in delineating the powers that can be granted under a s. 7 Representation Agreement with Limited Powers and those may be included in a s. 9 Representation Agreement with General Powers.

	Section 7 Representation Agreement with Limited Powers	Section 9 Representation Agreement with General Powers*
Personal Care	The adult's personal care, including, for example, where and with whom the adult is to reside. Accept admission to a care facility but only if it is a family care home, a group home for the mentally handicapped, or a mental health boarding home.* Purchases of food, accommodation and other services necessary for personal care.	Physically restrain, move or manage the adult, or have the adult physically restrained, moved or managed, when necessary and despite the objections of the adult. Accept a facility care proposal and consent to admission to a care facility.*
Health Care	Major health care and minor health care as defined but not including the kinds of health care prescribed for in s. 9.* A representative named under s. 7 cannot make a decision to refuse life-supporting care or treatment.	Refuse consent to specified kinds of health care, including life-supporting care or treatment. Give consent, to specified kinds of health care, even though the adult is refusing to give consent at the time the health care is provided. Give consent to certain kinds of irreversible or controversial health care that may be included are those listed by regulation* which include: abortion psychotherapy ECT (Electro-convulsive therapy] tissue transplant aversive behavior treatment participation in medical research experimental health care.
Financial Affairs Business and Assets	Routine management of the adult's financial affairs, including payment of bills, receipt and deposit of pension and other income, and other activities listed in regulation including opening an account, withdrawing money for the benefit of the adult, renewing a loan, paying a mortgage, purchasing a motor vehicle, buying an RRSP, donating to charities etc.	Make arrangements for the temporary care, education and financial support of the adult's minor children and any other person cared for or supported by the adult. Conduct the adult's business and manage or dispose of the adult's assets.
Legal Matters	Obtaining legal services for the adult and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult's behalf.	Undertake any other specified task or make a specified decision that is not prohibited by law.

* *The Health Care (Consent) and Care Facility (Admission) Act* defines major and minor health care and prescribes by regulation the health care that can not be in a s. 7 and can only be in a s. 9 Representation Agreement with General Powers. Part 3 of the Act governing admission to care facilities has not been proclaimed.

The Question of Incapability

Section 3 of the *RA Act* codifies the common law presumption of capability and provides:

> *Until the contrary is demonstrated, every adult is presumed to be capable of*
>
> *(a) making, changing or revoking a representation agreement, and*
>
> *(b) making decisions about personal care, health care and legal matters and about the adult's financial affairs, business and assets.*

Section 10 defines the threshold test for the purpose of s. 9 whereby a person will be disqualified from executing a Representation Agreement with General Powers if

> *"the adult is incapable of understanding the nature of the authority and the effect of giving it to the representative".*

It is generally accepted that s. 3 codifies the common law presumption of capability and s. 10 is a statutory restatement of the common law test of competence. Some consider it equivalent or similar in kind to the test to execute an enduring power of attorney.* In any event, there seems to be consensus that it is the common law test for competency that has been embedded for the purpose of a s. 9 Representation Agreement with General Powers, depending on the complexity of the decisions made and powers given. This is somewhat ironic given that there is no positively stated threshold capability test for s. 7 Representation Agreements with Limited Powers which albeit are limited by seriousness, but not kind, of decisions from s. 9. The latter, interestingly, also do not need to be certified by any third party in order to be valid.

At present, in order for a s. 9 Representation Agreement with General Powers to be valid, the adult executing the agreement must consult with a BC lawyer. This is provided for in s. 9(2)(a)(i) which states:

> *9(2) A provision in a representation agreement that authorizes a representative to do anything described in subsection (1) is invalid unless*
>
> *a) the adult authorizing the representative consults with one of the following about the provision:*
>
> *(i) a member of the Law Society of British Columbia;*
>
> *(ii) anyone who belongs to a prescribed class of persons, and*
>
> *(b) the person who is consulted completes a certificate in the prescribed form.*

* See *In Re K (Enduring Powers of Attorney); In re F, [1988] 1 Ch. Div. 310 (Ct. of Protection)* and *Godelie v. Public Trustee (1990), 39 E.T.R. 40 (Ont. Dist. Ct.)*

The Legislature enacted the section, naming members of the Law Society as consultants, which has now been duly proclaimed into law. The fact that a member of the Law Society can consult for the purposes of certifying a s. 9 Representation Agreement is, therefore, a given and has not been questioned as a part of this review.

The consultant, at present a BC lawyer, will be responsible for ensuring that the donor is able to qualify as capable under the statutory test of incapability. The lawyer must attest, in the *Certificate of Person Consulted About a Representation Agreement (Form 2)*, the following:

> *I explained the provisions of the representation agreement to the adult making or changing the agreement, and he/she appeared to understand the nature of the authority given to his or her representative(s) and the effect of such authority.*

For a less complex s. 9 agreement, the test for financial and legal decisions is in line with the capability requirement for an enduring power of attorney.

The first and most important step for a consultant in assisting to execute a Representation Agreement under s. 9 is to ensure the donor is not incapable of doing so. Under several of the statutes making up this guardianship package, there is specific provision for measuring incapability. Regulation [13/2000] lists the three elements of the test for incapability for the purpose of the abuse and neglect legislation. Practice Guidelines have also been developed for assessors who measure incapability in order to standardize practice across the Province. Those Guidelines are binding on assessors by virtue of s. 2 of the Regulation under the abuse and neglect statute, referred to as the support and assistance legislation. No such test or guidelines have been promulgated for the purpose of measuring for incapability for the purpose of ss. 9 and 10 of the *RA Act*. There is also considerable attention paid to assessing incapability under the *Health Care (Consent) and Care Facility (Admission) Act*. The provisions in the companion statutes regarding adult guardianship and health care consent, however, may shed some light on the process to be undertaken under the *RA Act*.

Most importantly, it must be recognized that it is conceivable that a donor may be capable of designating a representative and documenting their advance decisions for that representative to honour, in some, but not in all, of the kinds of decisions listed.

It may be trite, but nevertheless important, to state that measuring incapability is task specific. That means that the capability required for various legal transactions including, entering into a marriage, finalizing a contract, executing a will or disposing of property, are different. It is important, however, to make the following additional observations with respect to the issue of assessing incapability:

1. Assessing for incapability is not a clear-cut exercise where a person either is or is not capable for all purposes. A person may be capable for one kind of decision and not another. A person may appreciate the effect of one kind of decision but not another.

2. A person's incapability may also vary from day to day, indeed hour by hour, because of, for example, medications, anxiety, stress, and mental illness or fading in and out of dementia.

3. Incapability assessment is not the bailiwick of one profession or occupation. No assumptions should be made based on the assumed competence of a particular professional group. Lawyers often have to make an evaluation as to the incapability of their clients, for example, when doing a trust, contract, enduring power of attorney or a will. Many legal counsel recognize that their expertise is limited and will often times refer, where there is a question, to a medical professional. Some registered nurses such as critical care nurses will be experts while other nurses do not have the requisite expertise. Some physicians assess incapability on a standardized test that may tend to disqualify some people inappropriately because the test is no longer valid in particular circumstances. Some health care and social work practitioners who currently do assessments have received an orientation to assessing incapability for Part 3 of the *Adult Guardianship Act*.

   Our understanding about the abilities of some people has improved dramatically in recent years. This legislative package is, in part, a testimony to that improved understanding. This comes as a result of:

   a. alternate forms of communication being developed

   b. improved understanding of people's true abilities

   c. more sensitivity to the need to be patient and that given a bit more time to make decisions and demonstrate an understanding, many more individuals will not be considered incapable

   d. improved appreciation for the fact that it is those people who are closest to a person such as a family member or friend who can best assist in demonstrating the capability of a person.

4. It is incumbent on the consultant to tease out where the donor

appears to understand the nature of the authority given to the representative for each particular kind of decision and the effect of giving that authority. The outcome will be a determination of which decision making areas, if any, the donor is incapable. In the end, a donor may, for example, have a representative named for health care including end of life decisions but not for financial or legal purposes.

5. The donor need only be capable of granting the authority to the representative and not necessarily be capable of managing the details of her or his own affairs or complete the complex transactions to be undertaken by the representative under the agreement.

6. Consultants must be a class of persons whose members appreciate the importance of record keeping and who, as a matter or course, document details of import that will validate their work should the certification be challenged at a later date.

Issues Raised regarding the Legal Community

The Law Society of British Columbia ["LSBC"] and the Canadian Bar Association ["CBA"] through its Representation Agreement Act Sub-Committee of the Wills and Trusts Sections and the Notaries Public Committee gave considerable attention to this review. Their in-person meetings and written submissions, including an extensive response to follow-up questions provided after the initial consultation, all proved to be very helpful. I appreciate the time and thought that the LSBC and CBA devoted to this consultation. In addition, I had the opportunity to meet with the Legal Services Society of BC ["LSS"] and its member Community Legal Assistance Society ["CLAS"]. The important matters discussed with the LSS and CLAS will be dealt with under Findings.

The LSBC and CBA provided a thoughtful brief that raised some very important issues that are summarized, in part, here:

1. The submissions rightfully point out that the decisions to be made under s. 9 are considered to be, in some instances, complex. The breadth of the decisions and the inter-play of those decisions with other aspects of a person's legal affairs can be very complicated. This is particularly true where there have been successive marriages and blending of families. Lawyers are well positioned to serve clients who wish to execute a s. 9 Representation Agreement with General Powers and the situation of the client/donor is such that complex legal issues overlap with the execution of the agreement.

2. The attestation of incapability required under s. 9 is a very important step and not to be taken lightly by the consultant responsible for certification. There is a body of jurisprudence that is critical to one's knowledge of the law in this area. What is required of the consultant, in this regard, is substantially different, the LSS and CBA submits, than the responsibilities of a person witnessing the execution of an enduring power of attorney.

   The legal community representatives correctly point out that the issue of incapability is critical to the decisions to be taken under, and the validity of, the s. 9 Representation Agreement with General Powers. Clearly while members of the Law Society are without question well suited to be consultants, I am not persuaded that being a lawyer is the only profession that is suited to measure incapability for all of the decisions contemplated by s. 9. Indeed, much of the experience lawyers would have in the area of competence would be where a person is deemed incapable in a criminal or civil context and whose legal status is diminished. While most lawyers are well versed and trained in matters related to capability particularly as it relates to legal capacity, not all lawyers are, depending on the courses taken in law school, and subsequently, and the focus of their practice. Lawyers, as a profession, in my opinion, do not hold a monopoly on the expertise associated with assessing incapability.

3. Many prospective lawyers took courses in law school, in the bar admission course and as part of articles that would provide a natural

foundation for engaging in the role of consultant. Those lawyers whose area of specialty is trusts, business, property transactions and wills and estates are most likely to have a solid background suitable for acting as a consultant. Many members will have taken advantage of the CLE training and be well positioned to hold themselves out as able to undertake the role of a s. 9 consultant. A legal education itself is broad and comprehensive enough that many members will be able to cite conflicts and difficulties in other areas of the law that overlap with the grant of power contained in a Representation Agreement with General Powers such as family law. As the Canadian Bankers Association's submission indicated:

> *"Explaining the nature and effect of the authority requires the interpretation of a legal document. In some cases the agreement may be relatively straightforward but in other cases it may be extremely complex with ramifications which are not readily apparent."*

The presumption that all lawyers are well versed in trusts and dispositions of property, however, should be re-thought. When this is combined with the admission by the profession that enrollment in continuing education has dropped, one must be cautious of making any assumption that *all* lawyers are automatically primed to be a consultant. The protection is that all lawyers have agreed as a condition of practice to refuse any legal work that exceeds their personal level of competence.

Part of the complexities of a s. 9 Representation Agreement with General Powers involves the breadth of the decisions to be made. While lawyers are professionally trained and competent to identify and deal with the legal complexities of some of the matters arising, they are not necessarily the preferred source of information to consult regarding some of the other choices to be made by the donor. For example, are there others who may be more adept at discussing options in health care, personal care, choice of residence, or consent to rely on restraints, such as Long Term Care Assessors? It is considered important for lawyers to recognize their limited perspective and expertise in this regard and recognize the value of either:

a. engaging the assistance of a community resource, and/or

b. completing relevant continuing legal education to fully appreciate the nature of the consultation contemplated by s. 9.

4. While the LSBS or CBA did not raise this, there were consequential amendments to the *Legal Profession Act* proposed by the LSBC and

passed by the Legislature. The amendment prohibits a disbarred or suspended member of the Law Society from continuing to act as representative under the *RA Act*.

I appreciate the importance of these amendments from the LSBC's perspective in protecting the public. I make note of them for our purposes, however, for two reasons:

a. There was no amendment made to the definition of the "practice of law" in the *Legal Profession Act*. I believe such an amendment was not put forward because s. 9 contemplated naming others to perform the consultation and it was, therefore, not necessarily to be restricted solely within the scope of practice of lawyers;

b. The amendment infers that lawyers may act as a representative for their clients in the same way as they frequently act as a trustee or executor of an estate. I find this somewhat curious. Will the lawyer named as a representative also be the consultant for the donor pursuant to s. 9? While some lawyers know their clients very well, is it really the kind of intimate relationship based on trust and affection contemplated for the role of representative given the kinds of decision to be made over potentially a long period of time? Is there a conflict of interest to act as a lawyer/representative in matters for a client in legal matters and at the same time be the designated person to make health care decisions including end of life? Will the lawyer named as a representative be on call throughout the day for decisions regarding level of restraint? In my opinion, such a situation is riveted with problems.

5. The CBA and LSBC made forceful and thoughtful submissions on the issue of the inclusion of notaries as consultants. Their strong objections are based, in part, on their view that:

   a. a section 9 consultation is the practice of law

   b. given that this legislation makes an exception to where a person makes his or her own decision that may affect her or his liberty and that lawyers are the sole guardians of the protection of human liberty in a society governed by the rule of law, this consultation role should be guarded exclusively by lawyers

   c. notaries background knowledge and experience are insufficient to give adequate advice on what may be very complex agreements

   d. that attempts to train notaries will not provide adequate protection for the public

   e. the public interest can only be served if s. 9 consultations are reserved to lawyers.

BC Lawyers' Compulsory Professional Liability Insurance

Policy No. LPL 00-01-01

Professional services means:...

Acting as:
an administrator, conservator, executor, guardian, trustee or committee or in any similar fiduciary capacity;

provided that such services are connected with and incidental to the Individual Insured's profession as a lawyer.

"Public Guardian and Trustee Jay Chalke has asked Dulcie McCallum, former Ombudsman [original reference amended in Vol 13], to review the issue of whether the class of persons who must be consulted in drafting [sic] Section 9 certificates should be expanded to include classes other than lawyers. The [representatives of CBA] have all contributed to submissions to Ms. McCallum and Mr. Chalke calling on the government to uphold its responsibility to protect the public interest by requiring consultation with a lawyer.

BC notaries are aggressively advertising and lobbying to attempt to influence the outcome of the review. The reality is that allowing non-lawyers to authorize a Section 9 certificate does not protect the public's interest. At best, this would result in a two-tier system where those who have money would always choose to consult a lawyer to protect themselves, and those who choose not to consult a lawyer will be left legally vulnerable. At worst, the poorest and most vulnerable in our society could be further marginalized and exploited in terms of power over their life."

[Emphasis in the original text]

BarTalk, Vol. 12, No. 2, at p. 1

The CBA and LSBC have been tireless about challenging the work of notaries if it is seen to be infringing on that which constitutes the "practice of law." This due diligence is wholly appropriate and extremely important from the perspective of respecting the rule of law and preserving the integrity of the work of its members. The manner by which these organizations achieve this goal, however, should always be in keeping with the high standards promoted within the legal profession and done in a manner that could never be viewed as biased, overzealous, or less than respectful.

6. The LSBC and CBA recognize the importance of accessibility and have suggested that the profession should work hard towards that goal. Pro bono services and legal aid coverage were suggested as one solution.

"The legal profession also needs to consider its role in making tools such as representation agreements as accessible as possible. A commitment to this objective is particularly important given that the profession is working hard to continue to be the only body able to provide advice on section 9 agreements."

CLE Web site, at Client Perspectives

The Possible Inclusion of Notaries Public as a Prescribed Class

Throughout the consultation there was considerable interest in, and focus on, the possible inclusion of notaries public in the Regulations. This was not just at the initiative of the Notaries Society but many community groups and individual citizens. The following facts, information and analysis are provided to give the appropriate attention to this issue that it deserves and to provide the rationale for some of the findings found later in this Report:

1. The Society of Notaries Public [the Society] has been an active participant throughout the entire community development process tasked to design the guardianship legislation. Considerable resources of the Society, financial and in-kind, were dedicated to this process. Their keen interest in guardianship and devoted participation at the community level is notable but is not, however, relevant as to whether or not they are appropriately named as consultants. Many people and groups with expertise in matters relating to guardianship also participated in the community development process to the same extent but were not advocating to be named as consultants. I have given no weight in my findings to the overall commitment demonstrated by the Society to the question of whether they should be prescribed as consultants.

2. The Society's participation was, however, encouraged and welcomed by the other community participants. This was because of their recognized professional experience with executing and advising on similar-in-kind documents such as enduring powers of attorney, wills and property transactions with accompanying documents including those with effect in the Land Title Office.*

3. The Society worked throughout the developmental period with prior successive Public Trustees who, according to the Society, all endorsed the notaries' role with respect to Representation Agreements and indicated to the Society, their intention to recommend to the Attorney General that notaries be included in the regulations. The incumbent PGT chose to arrange for this consultation on the question prior to making his recommendation to the Attorney General in this regard.

4. Part of the professional scope of practice of notaries is laid out in s. 18 of the *Notaries Act*. This statutory scope is enhanced by those powers, rights, duties, privileges and emoluments attaching to the office of notary public by virtue of the common law. The Society devotes considerable attention to ensuring its members do not run afoul by engaging in activities not properly within their scope of practice. This regulatory role of the Society is very important and should continue undaunted.

* See Schedule 3 of this Report for the *Power of Attorney Act*, RSBC 1996, c. 370 and other relevant statutes.

5. In addition to the provisions of the governing statute, the common law and custom define what notaries can and can not do. What notaries can do is often defined by what they cannot do by virtue of the activity constituting "the practice of law", which is not properly within their scope unless granted by statute. The courts have had a number of occasions to consider the scope of practice of notaries by way of defining what constitutes the "practice of law," reserved solely to members of the Law Society.*

   Obiter in that case [at p. 22] indicates that powers of attorney clearly fall within the scope of practice of today's BC notaries. This is by virtue of the inherited features of the notarial profession from the English common law prior to 1858.

   > *The 1912 edition of Halsbury's (a source cited by the Court of appeal in the Notaries Reference) does not include probate practice in its general description of a notary's functions (at 493):*
   >
   > *A notary public is a duly appointed officer whose public office it is, amongst other matters, to draw, attest, or certify, usually under his [sic] official seal, deeds and other documents, including conveyances of real and personal property, and powers of attorney in relation to real and personal property situate in England, the British dominions across the seas, or in foreign countries; to note or certify transactions relating to negotiable instruments; to prepare wills or other testamentary documents...[His] office, which is one of great antiquity (a), is recognized in all civilized countries, and by the law of nations his acts have credit everywhere (b).*
   > [Gravelle, (supra), at p. 21]

   This is important for our purposes for two reasons:

   - Representation Agreements are, in part only, potentially similar-in-kind to enduring powers of attorney with respect to financial and legal matters. This is clearly the intent of the Legislature as evidenced by the fact that once the transition period to representation agreements has transpired enduring powers of attorney will be obsolete [though existing ones are grandparented] and its attendant legislation, repealed. The knowledge, skills and abilities associated with drafting and executing enduring powers of attorney for financial and legal matters is a legal service frequently provided by notaries.
   - Powers of attorney are an example of a service included within the scope of practice of notaries that is not expressly included in s. 18 of the *Notaries Act*.

Note to the Attorney General:

I would be remiss if I did not mention the strong sentiment held by many people, lawyers and members of the public at large, about the utility of enduring powers of attorney for financial and legal matters. Many continue to hold the view that the perfect combination is an enduring power of attorney with its familiar, all-encompassing powers and a s. 9 Representation Agreement with General Powers for the purposes of health and personal care decisions. The legal community has lobbied government tirelessly to retain the enduring power of attorney. More recently their efforts have been to try to extend the repeal date. The drawbacks cited most frequently regarding the use of s. 9 Representation Agreements with General Powers in place of enduring powers of attorney for financial and legal matters are:

- that they are complicated and cumbersome,
- there is no widely available standard form, and
- they are prescriptive, in that the document must give the specific powers to the Representative.

While it goes beyond the questions raised with me by the PGT for this review, because the numbers of people who raised this matter and who held the same opinion – to have powers of attorney retained for financial and legal decisions – were many, it bears reporting to you specifically at this juncture.

I note that on June 24, 2000 as this Report was being finalized you announced a further one year period before the transition from enduring powers of attorney is completed. This may address the concerns partially if the other concerns discussed in the Executive Summary are addressed during that period.

* *The Law Society of BC v. Gravelle et al.* (1998) Unreported Decision #A964141, BCSC] [Decision of the Court of Appeal pending].

6. The Society takes the position that while its members cannot practice law as defined by the *Legal Profession Act*, they can engage in work best characterized as legal services, albeit defined by statute, common law and custom. This position is supported by the definition of ***legal services*** under the *Social Services Tax Act* which imposes a 6% tax on those services:

   > **Definition of Legal Services:** Legal services means the services as described in the *Legal Profession Act* and listed under Section 18 of the *Notaries Act*.*

7. The decisions being made under s. 9 are important. People need to have confidence that their wishes will be accurately recorded and that the document they execute will be valid. They need to know a professional who will take responsibility to ensure that the document is properly prepared and executed. From the public's perspective what places their confidence in a particular professional group is based on the following factors:

   - whether its members can demonstrate that they have the appropriate and adequate knowledge, skills and abilities
   - whether their initial professional training and education is appropriately aligned with the professional work to be undertaken
   - whether the professional body and its members have an ongoing commitment to continuing education
   - whether the governing body adequately monitors the conduct and discipline of its members
   - whether the person who relied upon the services of a professional to her or his detriment can seek redress for errors, omissions, or negligence of its members through an adequate liability insurance scheme
   - whether a person who placed their confidence in the professional subsequently suffered a loss due to the member's misappropriation of funds will be reimbursed.

* Refer to Bulletin No. 61-86, dated January 1986, of the Consumer Taxation Branch

8. The decisions contemplated by a s. 9 Representation Agreement with General Powers are decisions of considerable import to the donor and the representative(s) as they involve major life decisions both personal and financial. This means that the importance of a professional consultation being available to a donor under s. 9 becomes that much greater.

   The Law Society and its members clearly attract public confidence on the basis of the factors listed above for professionals. Any member of the public who suffers a loss will have access to ample insurance protection and to a governing body that is vigilant about monitoring and disciplining its members for professional misconduct. Many lawyers, however, who have not yet availed themselves of continuing education could consider adopting a similar commitment to life long learning advocated for by the Law Society, the Canadian Bar Association and the Continuing Legal Education Society to prevent mishap.

9. In order for notaries or any other class of persons to be considered as consultants, the Society must be able to stand on a comparable footing. In that regard, the following facts have been considered*:

   - Notaries scope of practice is governed by statute, common law and custom largely carved out by statute
   - The notarial profession has been governed by statute since November 2, 1926. It was in 1956 that it became mandatory for a notary to belong to the Society and in 1957 the Society gained jurisdiction to discipline its members
   - The regulatory authority is the Society of Notaries, a body representative of its professional members that is established by the *Notaries Act*, responsible for the education and discipline of its members to protect the public interest
   - Conduct of notaries is governed and monitored by the Bylaws, Rules and a Code of Ethics and Professional Conduct
   - Under s. 20 of the *Notaries Act* a special fund, the Special Contingency Fund, must be established by the regulator, the Society of Notaries Public, to ensure there is an adequate process for the reimbursement of pecuniary loss sustained because of the misappropriation of trust funds by a member. The provisions governing the Special Fund are contained in Rule 6 of the Rules of the Board
   - The regulator requires there to be sufficient liability insurance and that all notaries must carry insurance to practice at a minimum of $1M per claim for errors and omissions. Rule 7 requires every member to participate in the Society's liability fund in a scheme approved by the Board

Definitions

Notary. An office of great antiquity known in all Western European countries. In Roman law, a *notarius* was a person who took notes of judicial proceedings. A notary's functions are to draw, attest, and certify deeds and other documents, to prepare mercantile documents, to note and certify transactions relating to negotiable instruments and to draw up protests or formal documents relating to occurrences on ships' voyages and their navigation. They administer oaths and take affidavits.

The Oxford Companion to Law, at p. 892

Notary Public. A public officer whose function it is to administer oaths; to attest and certify, by his [sic] hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgements of deeds and other conveyances, and to certify the same.

Black's Law Dictionary [4th ed.]

Rule 1 for Notaries

1.01 Members must discharge their duties to their clients, members of the public and fellow members of the profession with integrity.

Notes: Integrity, probity or uprightness is a prized quality in almost every sphere of life ...The best assurance the client have ... is the basic integrity of the professional consultant ...Integrity is the fundamental quality, whose absence vitiates all others.

*See Schedule 4 this Report for the relevant sections of the *Notaries Act*.

- The profession of being a Notary Public is a calling requiring specialized knowledge gained through post-secondary education in a two year Certificate course from the Faculty of Commerce and Business [Real Estate Division] at the University of BC
- Where there is a vacant Notarial District and the Membership and Credentials Committee reserves the Seal for that District, a qualified person can apply to the Court for an Order to face the Statutory Examinations administered by a Board of Examiners named by the Attorney General
- Notarial applications are scrutinized and subject to approval by the Secretary of the Law Society
- Upon successful completion of the examinations, the person will be installed as a Notary Public by being sworn/affirmed in by a Justice of the Supreme Court of BC upon taking an Oath of Office.
- The Society falls within the jurisdiction of the Ombudsman who is responsible to ensure the regulator respects the rules of natural justice and the principles of administrative fairness in regulating its members and protecting the public
- Notaries give undertakings that are governed by Rule 10 of the Rules of the Board and Rule 17 of the Code of Ethics
- Discussions between a client and notary are considered privileged in favour of the client and are considered confidential
- The Society encourages its members to be committed to life-long, ongoing education and training. A prime example is the keen interest the Society has taken in providing continuing education on the guardianship legislation.

OATH OF OFFICE

Form 1 Schedule to the Notaries Act

I, *Jane Doe*, do swear/affirm that I will not make or attest any act, contract or instrument in which I shall know there is violence or fraud, and in all things I will act uprightly and justly in the office of a notary public.

10. Some people are of the opinion that notaries public may be more accessible and affordable to the public. Some view them as being more in touch with their communities. Many notaries are solidly rooted in their communities but, in my opinion, not necessarily to any lesser or greater degree than many lawyers. Certainly many people consider attending at the office of a notary to be less of an intimidating experience than that of a lawyer. However valid these perceptions, the fact that a notary prepares or certifies a Representation Agreement with General Powers instead of a lawyer does not in and of itself make the process more accessible or affordable. It is important that all persons named as consultants are sensitive to the goals of accessibility and affordability. Consultants must be conversant in the needs of all people wishing to execute a Representation Agreement with General Powers regardless of age, ethnic background, ability or means of communication. Being judicious with respect to the issue of cost and proactive in adopting a welcoming approach to all people will mean the public interest is being served.

Having said that, in terms of the cost associated with preparing s. 9 Representation Agreements with General Powers, both lawyers and notaries are entitled to charge a reasonable and appropriate fee depending on the complexities of the document. Government's goal of making access to Representation Agreements affordable ought to remain ***its*** responsibility and should not be confused with the right of both lawyers and notaries public to be paid appropriately and fairly for their professional services.

11. The work of notaries has attracted considerable criticism from the legal community. This is often anecdotal in nature and associated with individual practitioners who wander beyond the territorial boundaries of the assigned notarial scope of practice. Some of this criticism is valid and raises some important issues. Like lawyers, notaries are required to limit their personal practice to those areas within the scope granted to notaries in which they consider themselves to be competent. This requires each individual notary to be diligent in the course of her or his work to avoid the frequently vocalized critique that notaries cause problems for clients when they fail to do so. A prime example cited by the legal community was where a lawyer had called the issue of incapability into question and subsequently a notary public applied a more relaxed test of capacity permitting the document to be executed. Given that the question of incapability is central to the preparation and execution of a s. 9 Representation Agreement with General Powers, individual practitioners and the Society must recognize the importance of being on the alert to avoid problems and scrupulous about understanding and applying the appropriate incapability test. It is anticipated that the training required as a prerequisite designed by the PGT will place considerable emphasis on this aspect of executing an agreement.

12. The traditional work of notaries most often involves the drafting and execution of documents that have many standard clauses such as enduring powers of attorney, mortgages and wills from which the practitioner can choose to suit the needs and instructions of a particular client. At the moment, no standardized format for a s. 9 Representation Agreement with General Powers has been produced either by the PGT or in Regulation. This is interesting given that there are many certificates for which a form has been provided under the legislation that must be executed to validate the agreement. Once such a template has been developed, produced and made public by the PGT in accordance with the recommendation in this Report, the preparation of many s. 9 Representation Agreements with General Powers with standardized provisions will lend itself well to the scope of notarial practice.

Report Findings

Section 9 contemplates prescribed classes

1. The governing statute, the *RA Act*, contemplates that there may be other classes of persons prescribed by Regulation to be consultants for the purpose of s. 9 Representation Agreements with General Powers. The subparagraph provides:

> *9 (2) A provision in a representation agreement that authorizes a representative to do anything described in subsection (a) is invalid unless*
>
> *(a) the adult authorizing the representative consults with one of the following about the provisions:*
>
> *(i) a member of the Law Society of British Columbia;*
>
> *(ii) anyone who belongs to a prescribed class of persons, and*
>
> *(b) the person who is consulted completes a certificate in the prescribed form.*

On a literal interpretation of the section as a whole, two findings are made:

- the specific reference to a member of the Law Society in subparagraph (i) does not predetermine those persons who may be prescribed by regulation by virtue of subparagraph (ii) of the statute;
- lawyers have the authority to consult for a Representation Agreement with General Powers because of s. 9 in the *RA Act* and not because executing or drafting a Representation Agreement has been included in the s. 1 definition of the "practice of law" in the *Legal Professions Act*.*

* See Schedule 5 of this Report for the definition of "practice of law."

Purpose of the *Representation Agreement Act*

2. The purpose of this new guardianship legislation is provided for in s. 2 of the *RA Act* which are important to reproduce here:

> *The purpose of this Act is to provide a mechanism*
>
> *(a) to allow adults to arrange in advance how, when and by whom, decisions about their health care, personal care or financial affairs or about other matters will be made if they become incapable of making decisions independently, and*
>
> *(b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.*

These purposes have recently been summarized by the PGTBC in information prepared for the public that states:

> The act enables adults to plan for a time when they may become incapable of making their own decisions. Representation agreements can cover all aspects of an adult's life – health and personal care, as well as financial and legal matters.*

Consultation versus Drafting

3. The statutory requirement that the consultant certify the capability of the donor to execute a Representation Agreement in order for it to be valid does not mean or infer that the Representation Agreement must be ***drafted and/or prepared*** by the consultant. This will often be the case in practice but is not required by the statute. Had the Legislature or Cabinet intended this to be the case, their choice of wording in s. 9 and Form 2, respectively, would have been substantially different.

* [PGTBC Homepage: Adult Guardianship: Representation Agreements, at p. 3]

Meaning of "to consult"

4. Section 9(2)(a)(i) makes specific reference to members of the Law Society who are given the authority to "consult." Indeed in order for a Representation Agreement under s. 9 to be valid, the donor must consult with a lawyer who is responsible to sign a Form 2 certifying that the donor appeared to understand the nature and effect of the Representation Agreement.

a. Definition

The word "consult" is used specifically in s. 9. To consult is interpreted as meaning something substantially different from, or more than, other statutory language that could have been used such as independent legal advice, attest, draw, issue, administer, supervise, counsel, or prepare. The definition of consult is important in helping to understand the role of the prescribed class:

> **Consult:** to deliberate, to counsel; to ask the advice or opinion of; to refer to; to have regard to; to deliberate together; confer.
>
> *[Webster's Dictionary]*
>
> **Consult:** Advice, counsel, adhortation, word to the wise, suggestion, submonition, recommendation, advocacy, guidance, instruction, adviser.
>
> *[Roget's Thesaurus]*

For our purpose in s. 9, the word "consult" should be given its ordinary meaning and a broad and liberal interpretation.*

The wording of the Certificate [Form 2] also provides some guidance as to the meaning of consult:

"I explained the provisions of the representation agreement to the adult making or changing the agreement, and he/she appeared to understand the nature of the authority given to his or her representative(s) and the effect of such authority".

"However, lawyers do not always have an extensive understanding of issues dealing with seniors, people with disabilities and perhaps more importantly with: the scope of competency. It would be helpful if lawyers making this type of Rep Agreement had some training, or some support structure in place to assist them in determining competency, when it is suspect".

A representative of a Health Authority

b. The Role of the Consultant

The word means that the person being consulted will know something about:

- How to assess incapability and given the presumption of capability in the statute, enable a person, the would-be donor, to demonstrate capability. Many people will be faced with the task of executing a s. 9 Representation Agreement with General Powers as their incapability begins to be called into question by themselves or others. While planning well in advance of a crisis is the ideal, for many, that will not be the reality. What is important is that an accurate determination of incapability is made.

* *Interpretation Act*, RSBC 1996, c. 238

- A consultation may take some time. For many professionals today, there are significant time pressures and efficiency is held at a premium. For many people who may wish to avail themselves of the benefit of having a Representation Agreement, there may be significant issues that impact on the time for the consultation that need to be taken into account including:
  - Language and cultural barriers
  - Hearing limitations
  - Access to Representation Agreement forms which can be provided by the consultant in advance
  - Agreements and information pamphlets written in plain language and available in large print
  - Need to respect the donor's right to be heard, absent the influence of family members, and the right not to be discriminated against on the basis of age
  - Reliance on alternate forms of communication such as American Sign Language, blissymbolics or PIC boards
  - Office space that is accessible and seniors' friendly [wheelchair washrooms, back lighting, furniture etc]
  - Knowledge of factors that may influence communication such as medications, stress, fear and illness
  - Many decisions involve ethical questions and may be difficult and time-consuming for the donor.
- The word connotes that there will be information shared by the consultant or that the consultant will ensure that the person making the agreement is informed about the nature and effect of her or his advance decisions contained in the Representation Agreement with General Powers and will appear to understand.

What "consult" may not mean

5. In order to be considered a competent consultant under s. 9, on an initial reading it appears that the person will have to be knowledgeable in a wide spectrum of areas. Who knows about all of the implications of all of the health care decisions? And likewise for financial, legal and personal care? The prescribed persons, however, may not have to be fully conversant in all of the matters relevant under s. 9 including knowledge, skills and abilities relevant to:

   a. assessment of incapability;

   b. alternate forms of communication;

   c. minor and major health decisions including invasive procedures, and withdrawal of care or treatment;

   d. financial, business, and property decisions;

   e. care, education and financial support of children of the adult; and

   f. personal care choices including decisions with respect to the physical treatment or restraint of the person as to where and how they live.

   To "consult", therefore, does not necessarily mean that the consultant will be an expert in each of the areas of decision making. This would present an onerous standard of care on any consultant signing the certificate regardless of professional title or training. The consultant can, where appropriate or necessary, encourage the donor to contact a community resource for the purpose of a detailed explanation regarding the decision making powers to be given to the representative. The consultant needs to know the resources available to the donor.

   a. Assessing Incapability

      With respect to the issue of incapability to make a s. 9 Representative Agreement with General Powers, the consultant is obliged, where there is any question, to obtain an assessment. This may require a professional report being solicited by the consultant from a health care practitioner. All consultants should be cognizant of the fact that a particular professional title does not necessarily mean all people within that category have the requisite expertise to evaluate incapability. The PGTBC can be of assistance to consultants by identifying which professionals in the community and in facilities are competent to do these assessments when required. Many of the professional bodies and community resources that participated in the consultation are willing to assist to identify who amongst them is competent to undertake these assessments when required.

b. Reliance on Community Resources

In order to know when to refer to a community resource with respect to the consultation on the actual decisions to be made:

- where the consultant's expertise does not extend in a particular area, satisfies her/himself that the donor has sought out information from other sources or declines to do so, or
- the consultant defers to a designated resource and encourages the donor to seek advice from the appropriate resource for information and guidance, but
- in either case, the consultant is able to satisfy her or himself that the donor appears to understand the nature and effect of naming a representative and the terms of the Representation Agreement with General Powers.

Community Resources

6. Many of the decisions contemplated by s. 9 have serious consequences for the adult. Many give rise to ethical and spiritual questions. In order for the designation of a representative and for the donor's advance decisions to be truly informed, the designated resources providing advice need to be given clear direction and approval of their role and supported in providing that assistance to the donor and consultant.

   In reality, the resources that a donor would rely on in preparing a Representation Agreement with General Powers are the very same kinds of people that the individual would turn to in making the decision were they making it some time in the future, were they capable of doing so. In other words, a donor may discuss the termination of treatment with his or her priest or rabbi, doctor, hospital or community social worker, senior citizen counsellor and/or nurse. In giving binding instructions to a representative through a Representation Agreement with General Powers, the donor is making a decision in advance. Talking to those same resources serves to make the donor's choices informed ones.

The role of the community resource is to provide insight and guidance to the donor to assist in making informed and personally appropriate choices, on the donor's own initiative or on the advice of the consultant. Such a referral of a donor by a consultant is never mandatory or obligatory for the purpose of discussing options under decision making [save and except for when the consultant requires a report for the purpose of incapability]. It is open to the consultant to make the suggestion with respect to decision areas to be documented in the Representation Agreement with General Powers. Community resources who can assist donors will include:

- Health care practitioners
- Representation Agreement Resource Center
- Registered Social Workers
- Spiritual and religious leaders
- Advocacy organizations such as the BC Coalition for People with Disabilities, Canadian Mental Health Association – BC Division, BC Schizophrenia Society, or the BC Association for Community Living
- Competency assessors
- Senior Citizen and Peer Counsellors
- Financial advisers
- Communication specialists.

There is no appetite in the community of health care and social work professionals for taking on additional work on a voluntary, unrecognized basis, in already overtaxed systems. The reason why the role of a community resource is articulated in this Report is to give it the recognition and status it requires. But for the incapability of the donor, a person would seek out advice from these resources often directly, informally and as a matter of course. When the process needs to be escalated in anticipation of incapability and the need for a decision to be made, the role of community resources should be afforded the appropriate status by government and those working with Representation Agreements with General Powers.

Most often, community resources will provide their good guidance to a donor in the ordinary course of their professional work such as a financial adviser. Government must be on the alert, however, for any incremental costs associated with donors seeking advice from these community resources that are not already receiving appropriate funding and be receptive to dealing with that eventuality fairly, should it arise.

Representation Agreement Resource Centre

"The purposes of the Resource Centre are:

> to provide information, education, support, and assistance in Representation Agreements to individuals and their personal supporters...
>
> to train and support volunteers to assist people in local communities to learn about and to make Representation Agreements.

The Scrivener, Vol. 9, No. 1, April 2000, at p. 18

Affordability and Accessibility

7. With respect to affordability and accessibility, I make the following findings:

a. Pro bono

The legal community has been generous on many fronts for some time with its services. A recently completed survey provided during the consultation by the LSBC, documents the resources within the community able to provide some legal services *pro bono* or through legal aid or a community legal resource. Notwithstanding the considerable volunteer time given by lawyers over the years, the real issue is that the preparation of representative agreements may be too important to rely solely on the goodwill of lawyers to ensure affordability. The PGTBC and government have placed a great deal of importance on the guardianship legislation that ostensibly gives everyone the opportunity to do advance planning. I find that relying on the *pro bono* services of lawyers to be insufficient and does not adequately reflect the status intended for Representation Agreements.

b. Legal Aid

When a legal service is deemed essential such as when the legal proceedings may result in the person being detained, right to counsel will be provided through legal aid for those whose resources are limited.* The *Legal Services Society Act* requires the Society to provide the service. The objects are contained in s. 3 of the Act that states in part:

> *3 (1) The objects of the society are to ensure that*
>
> *(a) services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons...*
>
> *(2) The society must ensure, for the purposes of subsection (1)(a), that legal services are available for a qualifying individual who meets one or more of the following conditions:*
>
> *(a) is or may be a party to a proceeding respecting a domestic dispute that affects the individual's physical or mental safety or health or that of the individual's children;*

* Schedule 6 of this Report provides the present Income Guidelines for legal aid services provided subject to a means test.

(b) has a legal problem that threatens

(i) the individual's family's physical or mental safety or health,

(ii) the individual's ability to feed, clothe and provide shelter for himself or herself and the individual's dependents, or

(iii) the individual's livelihood.

Where a legal service falls within this provision, the LSS is required to provide the service on a legal aid basis [a tariff]. This means the government of BC is required to devote sufficient resources to the LSS to ensure the legal service is provided through the community legal offices and the private bar.

At present, the *RA Act* in s. 9 requires a donor to have the Representation Agreement with General Powers certified by a member of the Law Society. There is no choice for the donor. Donors must have the document certified by a consultant, at present, lawyers. The major decisions and choices in the Representation Agreement involve where and how the person lives, health care, financial commitments and care of dependents. The LSS has not been given funding from government to permit its lawyers to prepare Representation Agreements with General Powers. Because of the constant stretch on its resources, the LSS has chosen to instruct its staff specifically not to accept clients wishing to execute a Representation Agreement. I find that the Society's decision to take this step was reasonable and prudent due to the fact there has been no funding forthcoming from government either to support a tariff for the legal service or for public education.

The Attorney General has recognized the contribution made by the Society and others helping to make the legislation a success.

While this recognition of the LSS's contribution does not bind the Attorney General, his acknowledgement of the LSS's work in this area forms a solid background for his consideration of the recommendation in this Report. Given the requirement to see a lawyer is imposed by legislation and given the quality and nature of the decisions that will ultimately be made by the representative, I find that a tariff should be provided for this legal service. People with limited resources who qualify on a means test should be able to obtain a Representation Agreement with General Powers through legal aid. This will ensure that people of limited resources will also be able to plan for their future and avoid against any compromise of their interests as a result of not

having a Representation Agreement in place. Those without resources may be at greatest risk of having decisions made for them about a place to live, restraints and health care in a manner less than satisfactory unless a trusted, accountable representative is in place. Deeming Representation Agreements with General Powers as a tariff service allows the LSS to contract with the private bar. This will go a long way to making these agreements available, accessible and affordable.

The Society of Notaries have considered approaching the LLS to discuss where they could assist to prepare documents such as wills for single parents of limited resources. The Notaries could approach the LSS to ascertain if the tariff item could be made available to clients of notaries who pass the means test.

Should the PGT and AG decide to proceed with the recommendation that follows, the amount allocated for the tariff to cover the cost of preparation will be substantially reduced.

There was a strong outpouring of support for notaries put into writing during the consultation from seniors across the Province in response to the public relations campaign launched by the Society of Notaries of BC. The Seniors Advisory Council of the Ministry of Health departed from this position through their submission that highlighted the expected outcomes for Seniors:

"Ease of access to the service

Affordability of the service

Expert consultation and information concerning major financial and health issues to be stated [in] the agreement

Appropriate action with regard to the assessment of capability"

Brief re: Seniors Advisory Council's Position on the Representation Agreement Act

c. A Prescribed Form of Section 9 Representation Agreement

The PGTBC has produced public education documents widely distributed through presentations, mail-outs and homepage. This includes a very recent booklet *"It's Your Choice: A Guide to Making a Representation Agreement"* that contains a very helpful checklist.* The checklist is very comprehensive and is a major stepping stone towards a prescribed form.

To date, however, the PGT has been hesitant to produce or publicize a Representation Agreement prototype for either ss. 7 or 9. The PGT's rationale regarding s. 7 is that if a form was available that many people would use that form, thinking they had planned adequately. This heavy reliance on a s. 7 form would leave many having to get a Court appointed Committee under the *Patients Property Act* at some time in the future for the more serious decision making. With respect to s. 9, the PGT wanted to leave the period immediately following proclamation in February of this year for lawyers to take the initiative to design, produce and refine some solid examples.

* Schedule 7 is the Representation Agreement Checklist contained in *It's Your Choice - A Guide to Making a Representation Agreement.*

The guardianship legislation has been "on the books" for some period of time. Notwithstanding the logic of the PGT's concerns with respect to s. 7 and the advantages of the PGT's initial approach regarding s. 9, in my opinion, sufficient time has past for various forms of agreements, both ss. 7 and 9, to have emerged from lawyers and others. Given the availability of those precedents and the checklist, a prototype s. 9 is clearly within sight.

Section 7 specifically contemplates that a prototype may be prescribed by Cabinet:

> *7(3) The Lieutenant Governor in Council may prescribe a form of representation agreement containing the provisions authorized by this section, but the use of the form is optional.*

Presumably the reasoning for including this subsection was because no consultant is required to validate a s. 7 Representation Agreement with Limited Powers, unlike s. 9 where often the consultant will oversee or undertake its preparation. The Legislature saw fit to make provision in subsec. 7(3) of the statute for the Lieutenant in Council to prescribe a s. 7 form by Regulation. Such a standard form has not yet been prescribed.

The fact that s. 9 is silent in this regard does not, in my opinion, preclude the PGT from developing a comparable template for s. 9 Representation Agreement with General Powers given s. 41 of the *Interpretation Act*.* To truly promote affordability and accessibility, the option of producing standard format ss. 7 and 9 Representation Agreements is highly attractive. It will provide clear evidence of the PGT's and the Attorney General's commitment to the principles of accessibility and affordability. To make it patently clear, notwithstanding the *Interpretation Act*, s. 9 should be amended to read the same as or similar in kind to subsec. 7(3).

"As there is no standard form agreement, the content of a representation agreement is limited only to the drafter's imagination. It is also limited to the drafter's ability to express in writing the intentions of the person making the presentation agreement. Unclear, ambiguous or conflicting terms in representation agreements may delay or impede third parties from acting on representative's instructions and will increase the likelihood of disputes among interested parties (various representatives, monitors, person making agreement, concerned relatives/friends etc.)

We support the government's goal of making section 9 agreements accessible, affordable and of high quality. We suggest that a prescribed or standard form agreement can accomplish this for a majority of British Columbians."[Emphasis added]

Submission by the Canadian Bankers Association

* See Schedule 8 of this Report for the text of the Regulation power in s. 41 of the *Interpretation Act*, RSBC 1996, c. 238, s. 41.

d. Notaries and Lawyers

While many people have the perception that the cost of notaries is more reasonable, there is no clear evidence that the fee for a notary to prepare a Representation Agreement will be any more affordable than lawyers. Many also consider notaries more accessible because their offices are less formal or intimidating. That having been said, it is reasonable to assume that any representation agreement that is highly complex will be more costly for the donor. Taking steps such as the PGT issuing a prototype, legal aid being available and adequate training for all consultants are far more likely to make Representation Agreements affordable and accessible to more people than simply choosing between lawyers and notaries, based on assumptions. It is the complexity of the document that should dictate who the consultant should be and what is the appropriate fee.

"...and individuals themselves are very frustrated that it is so difficult and costly to have a Representation Agreement drawn up. Although everyone agrees that individuals should have legal advice before signing a Rep. Agreement, lawyers are simply too costly. If Notary Publics do get the authority to make Rep Agreements, their fees will also be too costly for people who are the poorest of the poor and face multiple barriers in accessing services. The feeling is that it should be the responsibility of government to ensure that there is some funding available to assist..."

Submission by the Coordinator of Community Response Network

I encourage lawyers and notaries to work collegially with respect to Representation Agreements. In most communities, they often work cooperatively and often share clients and work. I would encourage this congeniality to continue. This is a strongly held opinion by many representatives of the LSBC and CBA who consider some work associated with Representation Agreements to be so complex involving a multitude of legal matters that is more ideally suitable for a lawyer. This is true. It is redundant, in my opinion, to say that most donors in very complex legal situations will seek out a lawyer as their consultant. Notaries appreciate the scope of their practice and will most often self-exclude in cases that they consider beyond their expertise. The Notaries Society has a 1-800 number for its members to seek advice and guidance in this respect. The Society should continue to be vigilant about assisting and supporting its members in this way. Indeed, both lawyers and notaries are professionals and appreciate that when acting as a consultant they need to be diligent about withdrawing from preparing Representation Agreements with General Powers that are beyond their personal competence.

Training

8. Education is an extremely important consideration in any area of new law especially if the new legislation introduces novel or unique concepts and legal tests. Those most affected by or interested in this new legislation have been proactive and conscientious about alerting their respective constituencies about the new legislation and its impact. This includes most notably the PGTBC, the Continuing Legal Education Society, the Society of Notaries Public and the Representation Agreement Resource Center.

   Several factors must be taken into consideration in addressing the question of training. The factors identified as relevant during the course of this consultation are as follows:

   a. The *RA Act* is novel legislation that makes significant changes, additions and alterations to the law. In some cases it codifies and in others it fundamentally changes the common law. The details of the changes are very important because they involve such important decisions in everyone's life including personal care, financial, legal and health care.

   b. Many other players involved with this new legislation other than s. 9 consultants stand to benefit from education and training being available. This includes the donors, the representatives, the monitors, and people who will act as community resources for health, financial, legal and spiritual purposes and the public at large.

   c. The need to know will be a continuing one. That means that there will always be a pool of people who will seek training on this issue in the future unless and until the legislation is ever repealed. This includes any class of person prescribed by Regulation as a result of the acceptance of the recommendation in this Report or in the future. The Justice Institute of BC is an independent training centre with expertise in curriculum development. TheInstitute has demonstrated its competence in developing courses with other agencies and ministries relying on a collaborative approach. Often these courses involve a broad-based constituency such as mediation and conflict resolution. The Justice Institute is, by way of example, a prime location for the curriculum development for the required training for the notaries and for the companion public education package for representatives, donors, monitors, and the public at large.

   d. While many professional bodies and educational agencies have taken the initiative to develop and host courses, many people remain unfamiliar with the changes to the law.

   e. Because the proclamation of the legislative package was delayed for an extended period of time, interest in learning about the new laws may have peaked some time ago and may need to be rejuvenated, although this may be less so since February of this year. The PGTBC believes the interest surged again following proclamation.

"JUSTICE INSTITUTE OF B.C. – OUR VALUES

Relevant
Our programs, courses and services enhance justice and public safety and are relevant to the needs and interests of the people we serve.

Responsive
We respond quickly and appropriately to the changing learning needs of the people we serve.

Partnerships
We believe in developing partnerships that provide leadership and innovation in justice and public safety education and training."

f. Many self-regulating professional bodies fulfill the educational component of their mandate to their members free from outside scrutiny. The custom for self-regulated professional groups is that their educational initiatives and standards are not approved or accredited by any outside body or agency. That is part of what it means to be a profession.

g. The CLE is ideally situated to assume the training role with respect to members of the Law Society, community law office staff, legal assistants, legal counsellors and legal advocates.

h. The Justice Institute has several models of how they develop and offer programs. Upon a thorough exploration of the options in working with the Institute, I recommend the PGT consider a model such as the following as appropriate in this case:

- The client [PGT] has identified a need for training because of new legislation.
- The Justice Institute acknowledges the existence of that need though it appreciates that for some consultants the education will be provided by the CLE.
- The Justice Institute recognizes that there will be a continuing demand for this educational training.
- People who are monitors, representatives and community resources will have an interest in training.
- The Justice Institute has the capacity to develop a core curriculum for the prescribed consultants with a wrap around training program to serve other attendant populations. This curriculum can be provided on-line to serve all regions of BC and reach large numbers of people.
- The PGTBC in partnership with the Justice Institute design a curriculum and thereafter the institute administers the course on a cost recoverable basis. The companion, wrap around curriculum for others likely to benefit from instruction, will be made available through the Justice Institute including distance training.

The CLE's mission statement provides in part:

Our mission is to serve the needs of the legal community by continuing as the foremost resource of professional legal education.

We are committed to accomplishing our mission by

Assessing educational needs and supporting innovation in our approach to curriculum design, products and services

Providing programs and services to customers who serve or support the legal profession.

The Constitution of the CLE stipulates its objects that, in part, are:

(a) to conduct, develop and operate education programs for the legal profession in the Province of British Columbia in order to improve and extend the knowledge of the legal profession regarding present laws and legal processes...

(b) to direct attention of the legal profession to newly developing areas of law and legal processes....

(c) to encourage members of the legal profession to take further formal education in law.

Safety is the primary Public Interest issue

9. It is in the public interest to ensure that the prescribed consultants are in a position to provide maximum safeguards to protect those relying on their services. Most importantly, each member of the prescribed class must be committed to prevention of harm, to avoid any breach of their fiduciary duty to the donor and to ensure the sanctity and validity of the agreement upon which third parties will rely. This surety is accomplished through adequate professional preparation and training and access to ongoing support and advice from their professional body. This is accomplished in a variety of ways. Notaries have access to two 1-800 numbers throughout the province for on the spot advice. Lawyers can approach a Bencher for on call counsel. Legal assistants, counsellors, and advocates receive ongoing guidance from their supervising lawyer.

   When a member makes an error or omission in the course of performing a consultation, there must be adequate insurance to reimburse for a loss suffered by a donor or others to whom the consultant may owe a duty of care. Where there is mischief on the part of the member, there must be a source of reimbursement from a Special Fund for the unassuming public.

   I am satisfied that these safeguards are all in place for lawyers and notaries public.

Recommendations to the Public Guardian and Trustee

I recommend the following:

1. The PGT propose the following "class of persons" to be prescribed for the purpose of s. 9(2)(a)(ii) by Regulation pursuant to s. 42(2)(a):

    - Notaries Public certified as such under the *Notaries Act of BC* and registered with the Society of Notaries Public of British Columbia.

2. No other professional group other than contained in the first recommendation should be named as a prescribed class, at this time. Other potential groups were found to be unable to meet the requisite professional safeguards necessary to protect the public interest. The safeguards included members of the class having the appropriate:

    - knowledge, skills and abilities from their professional training
    - scope of practice that includes being consulted for documents similar in kind to representation agreements
    - governance by a regulatory professional body under a statute
    - required to have liability insurance and access to a special contingency fund
    - subject to rigorous rules and a professional code of ethics and subject to discipline and fines by the professional regulatory body.

3. The PGT to propose specific consequential statutory or regulatory amendments to the Attorney General that he considers necessary to ensure that there is no confusion as to the role of consultants under s. 9 including:

   - A definition for the word "consult" for the purpose of s. 9 by Regulation pursuant to s. 42(2)(g.1) of the *RA Act* that:

     1. incorporates the standard for a s. 9 consultation involving suggested referral to community resources;

     2. defines consult as "includes" not "means" to allow the concept to grow and develop over time; and

     3. in constructing the definition take into consideration the competencies of those classes of persons included in the statute and those to be prescribed by Regulation.

   - Include notaries as a prescribed class in the Regulation under the *Representation Agreement Act* (as above) and amend s. 18 of the *Notaries Act* to read:

     18(f) perform the duties authorized by an Act and/or Regulation.

     (or)

     18(e.1) act as a consultant under s.9 of the Representation Agreement Act.

4. The PGT develop, or collaborate in the development of, Rules and/or Guidelines for all prescribed consultants that:

   a. Detail under what circumstances a referral should be made to a third party community resource that all consultants should consider, where appropriate, prior to completing documentation for a s. 9 Representation Agreement with General Poweres, with respect to a referral(s) to a community resource(s) such as:

      - Health care practitioners including Critical Care Registered Nurses and Long Term Care Assessors
      - Registered Social Workers
      - Spiritual and religious leaders
      - Financial advisers
      - Advocacy organizations such as BC Head Injury Association and the BC Schizophrenia Society
      - Capability assessors
      - Senior citizen and peer Counsellors
      - Staff at the Representation Agreement Resource Center.

b. Give due consideration to:

- Making known the names of appropriate community resources to potential donors and prescribed consultants;
- Contacting professional bodies such as the Registered Nurses Association of BC, the BC Medical Association, and the Registered Social Workers Association to obtain the categories within those professional groups who could act as community resources and for what purpose under s. 9 - financial, health, personal care, legal; and
- Responding to contacts from community resources by advising affected ministries or other public bodies and entering into discussions with respect to how to manage any cost issues that may arise for some, but not all, of these community resources. The PGT, by giving due regard to such concerns, will engender good faith for those working in already overtaxed professions in some sectors.

  By way of example, it is further recommended that the PGT participate in any discussions with the Medical Services Commission and/or the BC Medical Association regarding:

  - the payments made in accordance with the Medical Services Commission payment schedule for consultation with patients age 75 or over in and out of office/hospital and to consider making this fee for service available to seniors under age 75
  - the payments in accordance with the Medical Services Commission payment schedule for any and all appropriate visits for medically required services that may encompass discussions regarding the provisions in any representative agreement.

c. Offer to assist the LSBC and the Society of Notaries to develop or revise the LSBC and Notaries' Rules to provide a practical guide to lawyers and notaries regarding such issues as conflict of interest or capability assessment that relate to the making of a Representative Agreement with General Powers.

5. Design a prototype for s. 9 Representation Agreements with General Powers in consultation with the LSBC and the Society of Notaries. The PGTBC should make it readily available and easily accessible to consultants and to the public at large. This should include making it available through the PGTBC web site.

   As the Regulations contemplated under s. 42 of the *RA Act* do not include a form being prescribed for s. 9 and s. 9 is silent on such a prototype, the PGT should recommend to the Attorney General an amendment to s. 9 of the *RA Act* that would read:

   > *"9(3) The Lieutenant Governor in Council may prescribe a form of representation agreement containing provisions authorized by this section and s. 7, but the use of the form is optional."*

   If the PGT does not accept this recommendation or the Attorney General does not proceed with the amendment, I strongly recommend, in any event, that the PGT promulgate a s. 9 prototype, in consultation with the LSBC and the Society of Notaries, and make it readily available.

6. The Regulation prescribing the new classes of persons to provide that each member of the prescribed class of persons eligible to act as a s. 9 consultant will have successfully completed either:

   - A training course pre-approved by the Public Guardian and Trustee including an examination to demonstrate competency to be consulted on s. 9 Representation Agreements with General Powers, or
   - The same examination could be used by a member of a prescribed class who wants to avoid the necessity of taking the required course by demonstrating, in advance, competency to be consulted on s. 9 Representation Agreements with General Powers.

7. Initiate and participate in discussions with the CLE, the LSBC and the CBA to consider ways to:

   a. ensure broader attendance of lawyers at the CLE courses on Representation Agreements and to encourage or require members to participate in continuing legal education regarding this new guardianship legislative package;

   b. develop a rule identifying Representation Agreements with General Powers as a preferred area of practice that will require lawyers to be able to demonstrate competence and/or attend pre-requisite CLE course prior to being able to advertise or hold out expertise;

   c. limit the members on the Lawyer Referral service named as s. 9 consultants to those who have demonstrated competence.

8. Under the Professional Rule Handbook, Legal Assistants can draft similar documents to Representation Agreements with General Powers such as wills and trust instruments but cannot perform a function given to lawyers, such as a s. 9 consultation and certification. In practice, it is likely that Legal Assistants will assist in the preparation of Representation Agreements. If the recommendations contained in this Report are followed, Legal Assistants, who are under direct supervision of a lawyer, should be permitted to assist in the preparation of a Representation Agreement with General Powers.

   To seek input from the LSBC and the CBA regarding the preferred training for Legal Assistants, given the supervising role of the lawyer, that should be provided through CLE but developed in consultation with the PGTBC.

   The LSBC amend the Legal Handbook to make it clear that Legal Assistants can assist with a s. 9 Representation Agreeement with General Powers on the proviso that the they have completed the CLE course and are supervised by a member of the Law Society.

9. In addition to the need to develop training for consultants under s. 9, there is a companion need for public education of others involved under the legislative package including representatives, monitors and designated experts. While this recommendation does not directly relate to the questions posed with respect to s. 9 to ignore the training component for the other constituencies would be wasteful. The core-training piece ought to be seen in the broader context making the educational initiative both expedient and cost-efficient.

   To consult with post-secondary institutes, for example the Justice Institute of BC, to develop a core curriculum for the prescribed consultants with a compatible instruction tool for others as members of the public who may also benefit.

10. Request the Attorney General to consider that s. 9 Representation Agreements with General Powers be designated a tariff legal service and that dedicated monies be provided to the LLS to fund the consultation service appropriately. This will enable and require the LSS to provide this service through its community and native law offices* to people who have limited resources and who qualify based on a means test. This recommendation becomes less important and may not be necessary, in the sole discretion of the Attorney General, if the previous recommendations are fully implemented.

* This funding for this service is a separate issue from the question of adequate resources for CLAS to be a prescribed advocacy organization under other statutes in the guardianship package.

11. To give due consideration to the implications that for a s. 9 Representation Agreement with General Powers to be valid, it must be certified by a member of the LSBC or other prescribed class, also professionals working within BC. There may be individuals who own property, have financial dealings, or plan to retire within BC but, at present, do not reside in BC. To consider:

    - what recommendations, if any, for statutory amendment need be made to make provision for validation of documents that are similar in kind to Representation Agreements with General Powers executed outside of BC for matters likely to arise in the future within the jurisdiction

    - whether to prescribe any class of persons outside of BC to enable those people with ties to BC, now or in the future, to manage their affairs in an affordable manner

    - recommending to the Attorney General participation in the development of an inter-provincial protocol regarding incapability planning. This is particularly important with respect to property transactions where the Land Title Office requires the original s. 9 Representation Agreement with General Powers. This would be consistent with the recent report for the Senate of Canada calling for inter-provincial protocols with respect to advance directives regarding health care and end of life decisions.

12. To bring to the attention of the LSBC the following potential issues regarding the Rules of Professional Conduct:

    - to consider amendments to Chapter 2 of the Rules of Professional Conduct to alter the definition of age by removing Rule 4. This will have the effect of amending the non-discrimination clause in Rule 3 to prohibit discrimination against persons 65 years and older

    - to review Chapters 6 and 7 regarding Conflicts of Interest between clients (e.g. Representative and Monitor) and between lawyer and client (e.g. where donor names the lawyer/consultant to be named her or his Representative).

    In this regard, with respect to the other prescribed classes of persons designated to be consultants other than lawyers, the PGT should ensure that these same issues with respect to conflict of interest are a part of the requisite, prescribed training for the newly prescribed consultants.

SCHEDULES

1. *Representation Agreement Act*, RSBC 1996, c. 405, ss. 7, 8, 9, 10

2. Listing of respondent associations, agencies and individuals who participated in the consultation

3. *Power of Attorney Act*, RSBC 1996, c. 370; See also *Land Title Act*, RSBC 1996, c. 250, Pt. 5 and *Evidence Act*, RBCC 1996, c. 124.

4. *Society of Notaries Act*, RSBC 1996, c. 334, ss. 18-28

5. *Legal Profession Act*, RSBC 1996, c. 255, s. 1 "practice of law"

6. Income Guidelines for Legal Services Society

7. Representation Agreement Checklist prepared by the PGTBC

8. *Interpretation Act*, RSBC 1996, c. 238, s. 41

(b) name the one who is to be the principal representative and the spokesperson for the other representatives, and

(c) specify a method for resolving any disputes among the representatives.

(3) A representation agreement naming more than one representative is invalid unless it contains the information described in subsection (2).

(4) A representation agreement is invalid unless each representative completes a certificate in the prescribed form.

1993-67-5.

Alternate representatives

6 (1) An adult who makes a representation agreement may name as an alternate representative any person who qualifies under section 5 (1).

(2) Section 5 (2) to (4) applies to an alternate representative.

(3) If an alternate representative is named, the following must be specified in the agreement:

(a) the circumstances in which the alternate representative is authorized to act in place of the representative, including, for example, if the representative is unwilling to act, dies or is for any other reason unable to act;

(b) any conditions subject to which the alternate representative is authorized to act in place of the representative, including, for example, conditions about the appointment of a monitor.

(4) When acting in place of a representative, the alternate representative is the representative for the purposes of this Act and any other Act.

(5) An alternate representative must notify the registrar as soon as the alternate representative begins to act in place of a representative.

1993-67-6.

Standard provisions

7 (1) In a representation agreement an adult may authorize his or her representative to help the adult make decisions, or to make decisions on behalf of the adult, about any or all of the following:

(a) the adult's personal care, including, for example, where and with whom the adult is to reside;

(b) routine management of the adult's financial affairs, including, ~~for example~~ subject to the regulations,

(i) payment of bills,

(ii) receipt and deposit of pension and other income,

(iii) purchases of food, accommodation and other services necessary for personal care, and

(iv) ~~the making, in the manner provided in the *Trustee Act*, of any investments that a trustee is authorized to make under that Act~~ the making of investments;

(c) major health care and minor health care, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*, but not including the kinds of health care prescribed under section 34 (2) (f) of that Act;

(d) obtaining legal services for the adult and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult's behalf.

(2) An adult may authorize a representative under subsection (1) (a) to accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for the adult's admission to a care facility, but only if the facility is

(a) a family care home,

(b) a group home for the mentally handicapped, or

(c) a mental health boarding home.

(2.1) A representative may not be authorized under this section to help make, or to make on the adult's behalf, a decision to refuse life-supporting care or treatment.

(3) The Lieutenant Governor in Council may prescribe a form of representation agreement containing the provisions authorized by this section, but the use of the form is optional.

1993-67-7.

Test of incapability for standard provisions

8 (1) An adult may make a representation agreement consisting of one or more of the standard provisions authorized by section 7 even though the adult is incapable of

(a) making a contract, or

(b) managing his or her health care, personal care, legal matters, financial affairs, business or assets.

(2) In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any of those provisions, all relevant factors must be considered, for example:

(a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;

(b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;

(c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;

(d) whether the adult has a relationship with the representative that is characterized by trust.

1993-67-8.

Other provisions

9 (1) In a representation agreement, an adult may also authorize his or her representative to do any or all of the following:

(a) physically restrain, move or manage the adult, or have the adult physically restrained, moved or managed, when necessary and despite the objections of the adult;

(b) give consent, in the circumstances specified in the agreement, to specified kinds of health care, even though the adult is refusing to give consent at the time the health care is provided;

(c) refuse consent to specified kinds of health care, including life-supporting care or treatment;

(d) give consent to specified kinds of health care, including one or more of the kinds of health care prescribed under section 34 (2) (f) of the *Health Care (Consent) and Care Facility (Admission) Act;*

(e) accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for the adult's admission to any kind of care facility;

(f) make arrangements for the temporary care, education and financial support of

(i) the adult's minor children, and

(ii) any other persons who are cared for or supported by the adult;

(g) conduct the adult's business or dispose of or manage the adult's assets that are not managed under section 7 (1) (b);

(h) ~~invest the adult's assets, in the manner specified in the agreement, in investments that a trustee is not authorized to make under the *Trustee Act*~~ invest the adult's assets;

(i) undertake any other specified task, or make any other specified decision, that is not prohibited by law.

(2) A provision in a representation agreement that authorizes a representative to do anything described in subsection (1) is invalid unless

(a) the adult authorizing the representative consults with one of the following about the provision:

(i) a member of the Law Society of British Columbia;

(ii) anyone who belongs to a prescribed class of persons, and

(b) the person who is consulted completes a certificate in the prescribed form.

1993-67-9.

Test of incapability for other provisions

10 An adult may authorize a representative to do any or all of the things referred to in section 9 unless the adult is incapable of understanding the nature of the authority and the effect of giving it to the representative.

1993-67-10.

Mental health decisions

11 Despite sections 7 (1) (c) and 9 (1) (c), an adult may not authorize a representative to refuse consent

(a) to the adult's admission to a Provincial mental health facility or psychiatric unit under section 22, 27, 28, 29 or 30 of the *Mental Health Act,*

(b) to professional services, care or treatment if the adult is detained under section 22, 27, 28 or 30 of the *Mental Health Act,* or

(c) to professional services, care or treatment under the *Mental Health Act* if the adult is on extended leave from a Provincial mental health facility or psychiatric unit under sections 37 and 39 of that Act.

1993-67-11.

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Re: s. 9 REPRESENTATION AGREEMENTS

VANCOUVER CONTACTS FOR PUBLIC GUARDIAN AND TRUSTEE CONSULTATION

Name of Contact and Organization	Street Address	Phone, Email and Fax
Karl Warner Jeff Hoskins The Law Society of BC	8th Floor 845 Cambie Van V6B 4Z9	669-2533
Ken Sherk Stan Nicol The Society of Notaries Public of BC	621 736 Granville Van V6Z 1G3	681-4516 1-800-663-0343 922-5972
Christine Gordon Joanne Taylor Representation Agreement Resource Centre BC Coalition	204 456 West Broadway Van V5Y 1R3	875-0188
Jim Pozer Community Legal Assistance Society	800 1281 West Georgia Van V6E 3Y2	685-3425 CLAS@vancouver.net
Alan Parker Susan Poulis David Duncan Legal Services Society	1500 1140 West Pender Van V6E 4G1	601-6018 601-6007
Carmen Theriault Chair, CBA – BC Branch Representation Agreement Sub-Committee c/o Bull Housser Margaret Sasges CBA request for 2nd meeting at her office	3000 1055 West Georgia Van V6E 3R3	687-6575

Schedule 2

1190 A Fort Street with Alice Finall and also Carmen Theriault and Gordon MacRae by conference call		
Hugh McLellan Canadian Bar Association	310 800 West Pender Van	683-5254
Dr. T.F. Handley College of Physicians and Surgeons	1807 West 10th Ave Van V6J 2A9	P:733-7758 F:733-3505
Peter Carter Credit Union Central	1441 Creekside Dr Vanc V6J 4S7	734-2511
Paul Griffin Canadian Bankers Association and Catherine Smith TD Bank Amiko Ando Royal Bank of Canada	345 625 Howe St Van V6C 2T6	806-3000 6654-0193 or 665-0194
Dr. Ian Courtice BC Medical Association	115 1665 West Broadway Van V6J 5A4	736-5551
Larry Odegard Health Associaton of BC and Lisa	750 1380 Burrard Van V6Z 2H3	488-1554
Lorraine Gillespie RNABC	2855 Arbutus St Van V6J 3Y8	P:736-7331 F:738-2272
Carol Ward-Hall BC Coalition to Eliminate the Abuse of Seniors	333 Sixth Street New Westminister V3L 3A9	P:521-1235 F:515-0201 Email Ceas@telus.net

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Ms. Pearl McKenzie Expert	8984 McLarey Ave Black Creek BC V9J 1A2	(250) 337-1934
Barbara Lindsay Coordinator of Advocacy and Policy Alzheimer Society of BC	20 601 West Cordova Van V6B 1G1	681-8651 Local 316
Laney Bryenton Gregg Schiller BCACL	300 30 East 6th Avenue Van V5T 4P4	875-1119
Bev Gutray Eric MacNaughton Canadian Mental Health Association	1200 1111 Melville Street Van V6E 3V6	688-3234
Nancy Hall Mental Health Advocate	905 207 West Hastings St Van V6B 1H7	775-4000 1-877-222-0412
Jane Duvall BC Schizophrenia	201 6011 Westminster Hwy Richmond, BC V7C 4V4	270-7841 Local 24
Pat Pisula Sid Sawyer The Law Foundation	1340 605 Robson Van V6B 5J3	688-2337

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Louise Krohn Justice Institute of BC New Westminster	715 McBride Blvd, New West V3L 5T4	525-5422
Continuing Legal Education Society	300 845 Cambie Van V6B 5T2	P:669-3544 F:669-9260 1-800-663-0437
Al Etmanski PLAN	Suite 101B – 3790 Canada Way, Burnaby V5G 1G4	P:439-9566 F: 439-9001
Trish Gauntlett North Shore Community Response Network	Cap Mall North Vancouver	985-7138 Local 130
Individual contacts made by telephone or in person [Contacts by letter, fax, or email are not included]	Charmaine Spencer Gerontology Research Centre SFU Dr. Peter Johnson Psychologist S. Gammer St. James Community Services Soc	P: 291-5047 F: 291-5066 531-6742 930-5522

Schedule 2

VICTORIA CONTACTS FOR PUBLIC GUARDIAN AND TRUSTEE CONSULTATION

Name of Contact and Organization	Street Address	Phone, Email and Fax
Ministry of Health	1515 Blanshard St Victoria, V8W 3C8	952-1083
Geri Hinton Office for Seniors Ministry of Health	Main Floor 1515 Blanshard St	P:952-1241 F: 952-1159
Gail Poole Consultant Health Law Professor University of Victoria	10 Moss Street Victoria, BC V8V 4L8	386-3349
Mark Horne Horne Coupar	3rd Floor 612 View St Victoria, BC V8W 1J5	P:388-6631 F:388-5974
John van Dongen MLA for Abbotsford	Meeting at his Legislature office	
Margaret Neylan Mohinder Gruval Seniors Advisory Council	c/o 1515 Blanshard Ave	c/o 952-1241

Schedule 3

POWER OF ATTORNEY ACT

CHAPTER 370

Contents

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6 Corporation may appoint attorney
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SCHEDULE

Definitions

1 In this Act:

"agent" includes an attorney acting under a power of attorney;

"knowledge" includes knowledge of circumstances that would put a reasonable person on inquiry;

"terminated", when used with reference to the status of an agent's authority, means that the authority has been terminated by revocation, or by operation of law or both.

Application

2 (1) Sections 3 and 4 do not apply to agency relationships that

(a) are created by section 7 of the *Partnership Act*, or

(b) arise under common law out of the relationship of partners to a firm and to each other.

(2) For the purposes of this Act, if a person has knowledge of the occurrence of an event that has the effect of terminating the authority of an agent, that person is deemed to have knowledge of the termination of the authority.

Liability of agent

3 If an agent purports to act on behalf of a principal at a time when the agent's authority to do so has been terminated and

(a) the act is within the scope of the agent's former authority, and

(b) the agent has no knowledge of the termination,

then, for the purpose of determining the liability of the agent for the act, the agent is deemed to have had the authority to so act.

Schedule 3

Effect of termination

4 (1) If

(a) the authority of an agent has been terminated, and

(b) a person who has no knowledge of the termination purports to deal with the principal through the agent,

then, for the purpose of determining the legal rights and obligations of the principal in relation to that person, the transaction is, in favour of that person, deemed to be as valid as if the authority had existed.

(2) Despite subsection (1), if the principal has

(a) by express revocation terminated the authority of an agent, and

(b) given notice of the termination to the agent,

the liability of the principal to any person for the subsequent acts of the agent must be determined without regard to this Act.

(3) If the authority of an agent to act on behalf of the agent's principal has been terminated, but

(a) the agent purporting to act for the principal enters into a transaction with a person (called in this section "the intermediate party"),

(b) the rights of another person (called in this section "the stranger") are dependent on the validity of the transaction entered into by the agent with the intermediate party, and

(c) the stranger had, at the material time, no knowledge of the termination of the authority of the agent,

then, for the purpose of determining the legal rights and obligations of the principal in relation to the stranger, the intermediate party is conclusively deemed to have had no knowledge of the termination.

Probate or administration granted to an attorney

5 If probate or letters of administration have been granted to a person as attorney for some other person, sections 1 to 4 apply as if the payments made or acts done under the grant had been made or done under a power of attorney of which that other person was the donor.

Corporation may appoint attorney

6 (1) A corporation within the legislative jurisdiction of the Legislature may, by instrument in writing under its corporate seal, empower a person, in respect of a specified matter or purpose, as its attorney, to execute deeds or documents on its behalf.

(2) An instrument executed by an attorney on behalf of the corporation is, if it comes within the scope of the attorney's authority, binding on the corporation and of the same effect as if it had been executed by the corporation.

Schedule 3

Deeds

7 A deed executed by an attorney under the seal of the attorney on behalf of a donor, whether an individual or corporation,

(a) is binding on the donor if it comes within the scope of the attorney's authority, and

(b) is of the same effect as if it were under the seal of the donor.

Enduring power of attorney

8 (1) The authority of an attorney given by a written power of attorney that

(a) provides that the authority is to continue despite any mental infirmity of the donor, and

(b) is signed by the donor and by a witness to the signature of the donor, other than the attorney or the spouse of the attorney,

is not terminated only because of subsequent mental infirmity that would but for this Act terminate the authority.

(2) The authority of an attorney under a power of attorney referred to in subsection (1) terminates on the making of an order under section 3 of the *Patients Property Act* or on the appointment of a committee under section 6 (1) of that Act.

Short form

9 (1) A general power of attorney may be in Form 1 or Form 2 of the Schedule.

(2) A general power of attorney, in Form 1, confers authority on the attorney and in Form 2 confers authority on more than one attorney acting separately or acting together, as the case may be, to do on behalf of the donor anything that the donor can lawfully do by an attorney, subject to the conditions and restrictions, if any, that are contained in the power of attorney.

(3) This section applies to a power of attorney made before, on or after October 14, 1987.

SCHEDULE

FORM 1

(Section 9)

Power of Attorney
(For the appointment of one attorney)

This GENERAL POWER OF ATTORNEY is given on ..... *(Date)*

by ..... *(Donor)* of ..... *(Donor's Address)*

I appoint the following person:

..... *(Name of Attorney)* of ..... *(Address of Attorney)*

Schedule 3

to be my attorney in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

(The following paragraph may be included if the donor wishes the authority granted by this power of attorney to continue despite any subsequent mental infirmity on the donor's part:)

> In accordance with the *Power of Attorney Act*, I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

This power of attorney is subject to the following conditions and restrictions:
(Cross this line out if there are no conditions or restrictions.)

WITNESSED BY:

.....
(Signature of Witness)

....
(Print Name of Witness) *(Donor)*

.....
(Address of Witness)

FORM 2

(Section 9)

Power of Attorney
(For the appointment of more than one attorney)

This GENERAL POWER OF ATTORNEY is given on..... *(Date)*

by ..... *(Donor)* of ..... *(Donor's Address)*

I appoint the following persons:

..... *(Name of Attorney)* of ..... *(Address of Attorney)*

..... *(Name of Attorney)* of ..... *(Address of Attorney)*

Cross out one of the following alternatives)
(who may act separately (*or*) who must act together) to be my attorneys in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

(The following paragraph may be included if the donor wishes the authority granted by this power of attorney to continue despite any subsequent mental infirmity on the donor's part:)

> In accordance with the *Power of Attorney Act*, I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

This power of attorney is subject to the following conditions and restrictions:
(Cross this line out if there are no conditions or restrictions.)

Schedule 3

WITNESSED BY:

.....
(Signature of Witness)

.....
(Print Name of Witness)

.....
(Address of Witness)

.....
(Donor)

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Victoria, 1997

Schedule 3

(6) Despite section 166, if an original instrument or document filed under this Act is

(a) a marriage certificate or a death certificate, or

(b) a trust instrument referred to in section 180 (4),

the registrar may, at the time the original instrument or document is filed, create a duplicate and return the original to the person who applied to file it.

PART 4 – FORMS OF INSTRUMENTS

Registrable instruments

39 Unless the use of a prescribed form is required by this Act, an instrument sufficient to pass or create an estate or interest in land is registrable, and for all purposes of registration effect must be given to the form of instrument according to its tenor.

Order in Council transferring government rights in highway

40 (1) A certified copy of an order of the Lieutenant Governor in Council releasing or waiving the right of the government in a highway vested in the Crown has the same effect as if a Crown grant had been issued by the government to the person named in the order in council as transferee, and must be so dealt with by the registrar.

(2) Unless an order in council under subsection (1) otherwise provides, the following are deemed to be excepted from its operation:

(a) minerals and placer minerals as defined in the *Mineral Tenure Act;*

(b) coal;

(c) petroleum as defined in the *Petroleum and Natural Gas Act;*

(d) gas or gases.

PART 5 – ATTESTATION AND PROOF OF EXECUTION OF INSTRUMENTS

Definitions

41 In this Part:

"corporation" includes Her Majesty;

"officer" means a person before whom an affidavit may be taken or made under section 42 (3), but does not include a registrar;

"signature" includes the mark of an individual who cannot sign his or her name in English characters;

"transferor" includes a grantor and assignor and any other transferring or charging party.

Schedule 3

Witnessing and execution

42 (1) The execution by a transferor of an instrument must be witnessed by an officer who is not a party to the instrument.

(2) Subsection (1) does not apply to

(a) a Crown grant,

(b) an order in council,

(c) a court order, or

(d) an instrument or an instrument that is of a class of instrument that is prescribed for the purposes of this section.

(3) An affidavit necessary for the purposes of this Act may be taken or made inside or outside British Columbia by and before a person before whom an affidavit may be sworn under the *Evidence Act*.

(4) The signature of a transferor on an instrument is proof, in the absence of evidence to the contrary, that the transferor

(a) knows the contents of the instrument and has signed it voluntarily, and

(b) has the legal capacity to execute the instrument and intends to be bound by it.

Witnessing – individuals

43 The signature of the officer witnessing the execution of an instrument by an individual is a certification by the officer that

(a) the individual appeared before and acknowledged to the officer that he or she is the person named in the instrument as transferor, and

(b) the signature witnessed by the officer is the signature of the individual who made the acknowledgment.

Witnessing – corporations

44 (1) In the case of an instrument that is executed by a corporation, the signature of the officer witnessing the execution is a certification by the officer that

(a) the individual who executed the instrument for the corporation appeared before and acknowledged to the officer that

(i) the individual is an authorized signatory of the corporation,

(ii) the individual and any other individual who executed the instrument for the corporation were authorized by the corporation to execute the instrument, and

(iii) the corporation existed at the time the instrument was executed and is legally entitled to hold and dispose of land in British Columbia, and

(b) the signature witnessed by the officer is the signature of the individual who made the acknowledgment.

Schedule 3

(2) A corporation must execute an instrument by its authorized signatory who must, on behalf of the corporation, sign his or her name to the instrument.

(3) In the case of an instrument executed for a corporation by more than one authorized signatory, only the signature of one authorized signatory is required to be witnessed in accordance with this Part.

Witnessing – individual power of attorney

45 (1) In the case of an instrument that is executed by an individual who is acting under a subsisting power of attorney, the signature of the officer witnessing the execution is a certification by the officer that

(a) the individual appeared before and acknowledged to the officer that

(i) the individual is the person named as the attorney of the transferor in a subsisting power of attorney,

(ii) if the transferor is an individual, the individual acting under the power of attorney had, at the time the instrument was executed, no knowledge of the death or bankruptcy of the transferor, or of the revocation of the power by the transferor, and

(A) if the power of attorney is not an enduring power of attorney under section 8 (1) of the *Power of Attorney Act*, the individual had, at that time, no knowledge of the mental infirmity of the transferor, or

(B) if the power of attorney is an enduring power of attorney under section 8 (1) of the *Power of Attorney Act*, the individual had, at that time, no knowledge of the termination of his or her authority by the operation of section 8 (2) of that Act, and

(iii) if the transferor is a corporation, it is legally entitled to hold and dispose of land in British Columbia and, at the time the instrument was executed, the corporation existed and the individual had no knowledge of the bankruptcy of the transferor or of a revocation of the power by the transferor, and

(b) the signature witnessed by the officer is the signature of the individual who made the acknowledgment.

(2) An attorney who is an individual must execute the instrument by signing his or her name and must indicate on the instrument that he or she is the attorney of the transferor.

Witnessing – corporate power of attorney

46 (1) In the case of an instrument that is executed by a corporation acting under a power of attorney, the signature of the officer witnessing the execution is a certification by the officer that

(a) the individual who executed the instrument for the corporate attorney appeared before and acknowledged to the officer that

Schedule 3

Commissioners because of office or employment

60 The following persons are, because of their office or employment, commissioners for taking affidavits for British Columbia:

(a) a judge of a court in British Columbia;

(b) justices;

(c) registrars, deputy registrars, district registrars and deputy district registrars of the Supreme Court;

(d) barristers and solicitors who are enrolled under the *Legal Profession Act* and who are not disbarred, disqualified or suspended from practice;

(e) notaries public;

(f) the local government officer assigned responsibility under section 198 of the *Municipal Act* and that person's deputy;

(g) [Repealed 1998-34-248.]

(h) the secretary treasurer of a board of school trustees;

(h.1) the chief executive officer of a francophone education authority as defined in the *School Act;*

(i) coroners;

(j) government agents and deputy government agents;

(k) provincial constables and municipal constables as defined in the *Police Act* holding a rank of sergeant or higher;

(l) other classes of office holder or employment the Attorney General prescribes.

Social workers

61 (1) The following persons are commissioners for taking affidavits for British Columbia only for the purposes of exercising the powers and performing the duties delegated to them under the following Acts:

(a) for the *Adoption Act,* each employee or officer of the government to whom the director of adoption has delegated powers or duties;

(b) for the *Child, Family and Community Service Act,* each person to whom a director under that Act has delegated powers or duties;

(c) for the *BC Benefits (Income Assistance) Act,* each person to whom the minister has delegated powers or duties under that Act;

Schedule 4

(3) An appointment and commission under this section may define and limit the area in which the person appointed may practise and may contain directions as to the limits within which the person may exercise the person's functions as a notary public.

(4) A person appointed under this section is not a member of the society.

Use of title "Notary Public"

16 (1) A person who is a member of the society may use the style and title of Notary Public in and for the Province of British Columbia and is a notary public.

(2) A person appointed under section 15 may use the style and title of Notary Public in and for the Province of British Columbia.

(3) This section does not apply to a notary corporation.

Persons to be considered to act as a notary public

17 (1) A person acts as a notary public if the person, for or in expectation of a fee, gain or reward, direct or indirect,

(a) draws, prepares, issues or revises a document that is intended, permitted or required to be registered, recorded or filed in a registry or other public office or that is a will or testamentary instrument, or

(b) holds himself or herself out as qualified to draw, prepare, issue or revise a document referred to in paragraph (a).

(2) Subsection (1) does not apply

(a) if, by the provisions of a statute, the document in question is required or permitted to be drawn, prepared, issued or revised by that person or the class of persons or profession of which the person is a member, or

(b) if the person is an employee acting in the course of the person's employment, and the employer may lawfully do the act.

Rights and powers of members

18 A member enrolled and in good standing may do the following:

(a) draw instruments relating to property which are intended, permitted or required to be registered, recorded or filed in a registry or other public office, contracts, charter parties and other mercantile instruments in British Columbia;

(b) draw and supervise the execution of wills

(i) by which the testator directs the testator's estate to be distributed immediately on death,

(ii) that provide that if the beneficiaries named in the will predecease the testator, there is a gift over to alternative beneficiaries vesting immediately on the death of the testator, or

Schedule 4

(iii) that provide for the assets of the deceased to vest in the beneficiary or beneficiaries as members of a class not later than the date when the beneficiary or beneficiaries or the youngest of the class attains majority;

(c) attest or protest all commercial or other instruments brought before the member for attestation or public protestation;

(d) draw affidavits, affirmations or statutory declarations that may or are required to be administered, sworn, affirmed or made by the law of British Columbia, another province of Canada, Canada or another country;

(e) administer oaths;

(f) perform the duties authorized by an Act.

Member not in good standing

19 A member who is not in good standing must not

(a) act or hold himself or herself out as entitled to act as a notary public, or

(b) act in any other capacity that derives from the member's status as a notary public.

Special fund

20 (1) The directors must continue the special fund for the purpose of reimbursing, in the cases and to the extent in each case, as they think advisable, of pecuniary losses sustained by a person because of the misappropriation or wrongful conversion by a member or former member of money or other property that was entrusted to or received by that person in the person's capacity as a member.

(2) If the special fund falls below $150 000, every member, on receipt of notice in writing from the secretary, must pay to the special fund in each practice year a sum set by the directors and the payments must be continued for each practice year until and including the practice year in which the special fund again reaches $150 000.

(3) An amount set by the directors under subsection (2) may be increased by members of the society at a meeting of the society if written notice of the proposed increase has been given to all members.

(4) The special fund is the property of the society and must be kept in a special account apart from the other funds or property of the society.

(5) The special fund is not subject to any process of seizure or attachment by any creditor of the society.

(6) The directors may invest or cause the special fund and the proceeds of it to be invested in the securities and in the manner they think fit.

(7) If the special fund exceeds $150 000, the directors may invest and use the excess for the purposes of the society.

(8) The special fund is not subject to a trust in favour of a person claiming compensation under subsections (9) and (10).

(9) If a complaint in writing is made to the society, alleging that a person has sustained pecuniary loss for the reasons described in subsection (1), the directors may cause an inquiry to be made into the complaint.

(10) If as a result of an inquiry the directors are satisfied that the person has sustained the pecuniary loss because of the action of a member or former member, they may

(a) with or without terms, pay out of the special fund to the person entitled the whole or a part of the loss, or

(b) decide that in the circumstances no payment is to be made.

(11) Nothing in this section affects or impairs the powers of the directors or a committee of them under the disciplinary provisions of this Act.

(12) A person appointed under section 15 is excluded from participation in or contribution to the special fund.

(13) The special fund does not apply to a complaint respecting the action of a person who was appointed a notary public under section 19 (1) of the *Notaries Act*, R.S.B.C. 1979, c. 299, or under a former Act and who, until August 21, 1981, was required to be a member of the society.

Annual increase in special fund

21 Despite section 20, effective June 30, 1987 and on each anniversary of that date, the amount referred to in section 20 (2) and (7) is increased by $20 000 until it reaches $500 000, and section 20 must be considered to be amended accordingly.

Liability insurance fees held in trust

22 Money paid to the society consisting of the professional liability insurance fees

(a) must be accounted for separately from other funds, and

(b) is not subject to any process of seizure or attachment by any creditor of the society.

Accounts

23 (1) In connection with a member's practice, the member must keep up to date records showing and readily distinguishing

(a) all money received and paid for or on behalf of others and the amount of money held on behalf of each other person, and

(b) money received and paid on the member's own behalf.

(2) Money received for or on behalf of a client

(a) is trust money,

(b) must be deposited in a savings institution in a trust account, and

(c) must be identified as a trust account in the records of the member and of the savings institution.

(3) Money must not be drawn from a trust account unless it is

(a) money paid to or on behalf of a client from funds that have been deposited in a trust account to the client's credit,

(b) money required for payment to the notary public for or on account of services rendered to or disbursements made on behalf of a client from money belonging to a client, or

(c) money paid into the trust account by mistake.

Audit

24 (1) The directors may at any time order and provide for the audit of the books and accounts of a member or former member.

(2) If the audit shows that the books and accounts are not in proper order and not kept up to date, the directors may require that the cost of the audit be paid to the society by the member or former member.

Suspension by directors

25 If an audit discloses that there has been a contravention of this Act or the regulations or rules relating to accounts, the directors may immediately suspend the member from practising and direct an inquiry under section 28.

Powers of discipline committee in relation to an inquiry

26 (1) The directors must appoint from among their number a discipline committee whose quorum is not less than 3.

(2) In the case of a vacancy, the committee may appoint a director to fill the vacancy until the directors do so.

Inquiry by discipline committee

27 (1) A panel of 3 or more members of the discipline committee may inquire into the conduct of members or former members, and for that purpose it has all the powers of a commissioner under Part 2 of the *Inquiry Act*.

(2) The committee or the panel may provide for preliminary inquiries by a member of the committee or by the secretary.

(3) The committee may order the suspension of the member until the consideration of its report by the directors.

(4) The committee or the panel may, at any time after a decision to inquire into the conduct of a member has been made, suspend the member until the conclusion of the hearing.

Schedule 4

(5) Notice of a suspension under subsection (4) must be served on the member promptly.

Discipline inquiries

28 (1) At the request of the directors or on the application of a person, or of its own motion, the discipline committee may, whether a complaint is made or not, inquire whether a member or former member has been guilty of any of the following:

(a) misappropriation or wrongful conversion by the person of money or other property entrusted to or received by the person in the person's capacity as a member of the society;

(b) incompetence;

(c) other professional misconduct;

(d) a breach of a provision of this Act or a regulation or rule made under it, or of a bylaw of the society.

(2) In the same manner as in subsection (1), the discipline committee may inquire whether a member or former member has engaged in conduct that in the opinion of the committee, ought to be reviewed by the directors to determine if it is conduct that in the opinion of the directors, is contrary to the best interest of the public or the notarial profession or tends to harm the standing of the notarial profession.

Notice of inquiry by discipline committee

29 (1) At least 7 days before an inquiry under section 27 is held, notice of the inquiry must be served on the member or former member in person or by registered mail sent to the last address shown on the records of the society.

(2) The notice must set out the time and place of the inquiry and give particulars of the complaint or of the matters to be inquired into.

(3) A notice sent by registered mail is conclusively deemed to have been given by the committee and to have been received by the member or former member on the 14th day after deposit of the notice in the Canada Post Office at any place in Canada.

Appearance before discipline committee

30 A member or former member may appear personally or with counsel before the discipline committee, and before the directors, on an inquiry or hearing into the person's conduct or competence and may cross examine witnesses and present evidence.

Nonappearance

31 If the member or former member fails to appear and on proof of service of notice, the discipline committee may proceed with the inquiry without further notice to the

Schedule 5

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession;

"costs" means costs assessed pursuant to a rule made under section 25 (2) (a);

"executive committee" means the committee appointed under section 24 (5);

"fiscal year" means the period beginning on January 1 and ending on December 31 in a year, or any other period that the benchers may establish in their rules;

"non-practising member" means a person to whom a non-practising membership certificate is issued under section 29 (4);

"officer" means the secretary, deputy secretary, assistant deputy secretary or other person appointed as an officer by the benchers;

"panel" means a panel established in accordance with section 59;

"practice of law" includes

(a) appearing as counsel or advocate,

(b) drawing, revising or settling

(i) a petition, memorandum or articles under the *Company Act*, or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body,

(ii) a document for use in a proceeding, judicial or extra-judicial,

(iii) a will, deed of settlement, trust deed, power of attorney or a document relating to any probate or letters of administration or the estate of a deceased person,

(iv) a document relating in any way to proceedings under a statute of Canada or British Columbia, or

(v) an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office,

(c) doing any act or negotiating in any way for the settlement of, or settling, a claim or demand for damages,

(d) agreeing to place at the disposal of another person the services of a barrister or solicitor,

(e) giving legal advice,

(f) the making of an offer to do anything referred to in paragraphs (a) to (e), and

(g) the making of a representation by a person that the person is qualified or entitled to do anything referred to in paragraphs (a) to (e),

but does not include

(h) any of those acts if it is not done for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,

(i) the drawing or preparing of an instrument by a public officer in the course of his or her duty,

(j) the lawful practice of a notary public,

(k) the usual business carried on by an insurance adjuster who is licensed under Division 2 of Part 6 of the *Financial Institutions Act*, or

(l) agreeing to do something referred to in paragraph (d), if the agreement is made under a prepaid legal services plan or other liability insurance program;

"practice year" means the period beginning on January 1 and ending on December 31 in a year, or any other period that the benchers may establish in their rules;

"respondent" means a person whose conduct or competence is the subject of a citation directed to be issued under section 40 (8) or under review by the benchers under section 49 or 50;

"retired member" means a person to whom a retired membership certificate is issued under section 29 (4);

"secretary" means the secretary or acting secretary;

"society" means the Law Society of British Columbia continued under section 2;

"suspension" means temporary disqualification from the practice of law;

"vice chair" means a person appointed to preside at meetings of a committee in the absence of the chair.

PART 1 – ORGANIZATION AND DUTIES

Incorporation and membership

2 (1) The Law Society of British Columbia is continued.

(2) All of the following are members of the society:

(a) barristers and solicitors who hold a practising certificate for the current practice year;

(b) retired members;

(c) non-practising members.

(3) A member of the society admitted as a solicitor of the Supreme Court is an officer of all of the courts of British Columbia.

Public interest

3 It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

Schedule 6

Income Guidelines for Legal Services Society

Household size	Criminal cases (including Appeals)	All other cases (including Appeals)
1	$833	$941
2	$1,250	$1,412
3	$1,458	$1,647
4	$1,612	$1,821
5	$1,778	$2,008
6	$1,932	$2,183
7 or more	$2,065	$2,333

Schedule 7

Representation Agreement Checklist*

What do you want your representative to make decisions about?

- **health care decisions that may be required like:**
  - routine medical and dental care
  - medical tests
  - major surgery
  - treatments for serious illnesses
  - palliative care or end of life care and treatment
- **personal care decisions like:**
  - living arrangements
  - family and friend visitation
  - admission to a care facility
- **management of your financial affairs including:**
  - payment of everyday living expenses
  - receiving and depositing income
  - selling of personal effects
  - arrangements for investments
  - buying or selling land
  - conducting your business affairs
- **managing your legal affairs such as:**
  - retaining or instructing a lawyer
  - signing legal documents or contracts

* From "It's Your Choice - A Guide to Making a Representation Agreement" published by the PGTBC.

Schedule 7

When do you want the agreement to take effect?

- on the date the agreement is signed, or
- at a later date:
  - what is the triggering event that activates the agreement?
  - how will people know the triggering event has happened?

Who do you want to name as your representative?

Note

Agreements with limited powers covering financial affairs where the representative is not your spouse require a monitor unless you have consulted with a lawyer

- identify the full name of your representative and their contact information (address, work and home phone number)
- if you are naming more than one representative:
  - the areas of decision making responsibility for each representative
  - how they will make decisions – jointly or separately, and how disagreements will be resolved

Do you want to name an alternate representative?

- identify the full name of your alternate representative and their contact information
- specify the circumstances in which the alternate will act instead of your representative

Do you want to have someone act as a monitor?

- identify the full name of your monitor and their contact information
- if you do not want a monitor you must state this fact in the agreement

Do you want to provide any specific instructions to your representative in your agreement that will guide them when they are making decisions on your behalf?

- about your health care
- about your financial affairs
- about your legal affairs
- about your personal care

Do you want your representative to be paid?

- if yes, describe:
  - the amount your representative will be paid
  - how the fee will be paid and from what source

Signing the agreement...

- choose who will witness the agreement

When the agreement has been signed, discuss with your lawyer...

- where the original document will be kept
- who requires copies of the document
- who needs to be advised of the agreement

consolidation, a reference in an enactment of the Province to the repealed enactment must, for a subsequent transaction, matter or thing, be construed to be a reference to the provision of the substituted enactment relating to the same subject matter.

No implications from repeal, amendment, etc.

37 (1) The repeal of all or part of an enactment, or the repeal of an enactment and the substitution for it of another enactment, or the amendment of an enactment must not be construed to be or to involve either a declaration that the enactment was or was considered by the Legislature or other body or person who enacted it to have been previously in force, or a declaration about the previous state of the law.

(2) The amendment of an enactment must not be construed to be or to involve a declaration that the law under the enactment prior to the amendment was or was considered by the Legislature or other body or person who enacted it to have been different from the law under the enactment as amended.

(3) An amendment, consolidation, re-enactment or revision of an enactment must not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

Notice by newspaper

38 If an enactment provides that notice must or may be given by publication in a newspaper published in a particular municipality, district, county, jurisdiction or other place, the provision must be construed to mean that the notice may be sufficiently given, if no newspaper is published at the time when the notice is to be given in the particular place, by publishing or advertising the notice in a newspaper published in British Columbia, nearest to the place mentioned.

Application of definitions in *Supreme Court Act* to other enactments

39 The definitions section of the *Supreme Court Act*, so far as the terms defined can be applied, extends to all enactments relating to legal proceedings.

Application of definitions in *Municipal Act* to other enactments

40 (1) The definitions section of the *Municipal Act*, so far as the terms defined can be applied, extends to all enactments relating to municipal matters.

(2) As an exception, subsection (1) does not apply in relation to the definition of "municipality" in the *Municipal Act*.

Powers to make regulations

41 (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to

Schedule 8

(a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,

(b) provide for administrative and procedural matters for which no express, or only partial, provision has been made,

(c) limit the application of a regulation in time or place or both,

(d) prescribe the amount of a fee authorized by the enactment,

(e) provide, for a regulation made by or with the approval of the Lieutenant Governor in Council, that its contravention constitutes an offence, and

(f) provide that a person who is guilty of an offence created under paragraph (e) is liable to a penalty not greater than the penalties provided in the *Offence Act*.

(2) A regulation made under the authority of an enactment has the force of law.

Subdivisions of Act

42 (1) A section is divided into subdivisions known in descending order as subsections, paragraphs, subparagraphs and clauses.

(2) In an enactment enacted before July 1, 1974

(a) a reference to a clause is deemed to be a reference to a paragraph,

(b) a reference to a paragraph is deemed to be a reference to a subparagraph, and

(c) a reference to a subparagraph is deemed to be a reference to a clause.

Citation of Acts

43 An Act may be cited by reference to

(a) its chapter number in the Revised Statutes of British Columbia,

(b) its chapter number in the volume of Acts for the year or regnal year in which it was enacted, or

(c) its long or short title, with or without reference to its chapter number.

Mutatis mutandis

44 If an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable.